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Hand book of International Law

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INTERNATIONAL LAW

[QUESTIONS & ANSWERS]

Along with

[*Problems, Leading Cases and Questions set at I. A. S., P. C. S. and other Examinations*]

[THOROUGHLY REVISED & RECAST]

By

R. C. AGARWALA, M.A., LL. M.

[illegible]

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Price : Rs. 40.00

SRI JAGADGURU VISHWARADHYA
JNANA SIMHASAN JNANAMANDIR
LIBRARY
Jangamwadi Math, Varanasi
ACC No. 8345

Published by :
Central Law Agency,
30-D/1, Motilal Nehru Road,
Allahabad-2

Printed at :
Taxco Printers,
273 Bahadurganj,
Allahabad-3

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PUBLIC INTERNATIONAL LAW

(QUESTIONS AND ANSWERS)

PART I

INTRODUCTORY

CHAPTER I

NATURE AND SCOPE

Q. 1. What do you mean by 'International Law ? Cite some popular definitions of International Law showing your preference to any of them Assign reasons for your preference ? (Q. No. 2 of P.C.S., 1976, 1985) (I.A.S. 1972).

A. Meaning of International Law —The term, "International Law", is of a comparatively recent origin. Until the middle of the 17th century this branch of law was customarily known as "the Law of Nations" or "Universal Law" (*jus gentium*). In the 17th century. the term "*jus inter gentes*" began to come into use. During the 18th and 19th centuries international law existed in different forms with different names in various countries. This subject has been given different nomenclature by different authorities. "International Law" is the title most frequently adopted by English and American jurists. Twiss, Lorimer, and Brierly elected to use the title "law of nations", while Hannis Taylor and A.S. Hershey preferred "International public law". Other suggested titles have been "the law between power" (e.g., by Taube), "inter-State law", and "the law of the community of States" (e. g., by Verdross). Dr. Jessup, in his recent work "Transnational Law" has adopted this latter to denote "all laws which regulate actions or events that transcend national boundaries."

International law is the law governing the relations of States *inter se* It can be defined as "the aggregate of rules governing relations between States in the process of their conflict and co-operation, designed to safeguard their co-existence, expressing the will of the ruling classes of these States and defended in case of need by coercion applied by State individually or collectively"— *International law published by Academy of Science of the U.S.S.R. (Institute of law), p. 7.*

Some popular definitions —Some of the popular definitions of International Law are given below :

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Manu.—According to Manu (the ancient Hindu law giver), men organised into different independent communities needed the prescription of known rules of conduct to guide them in their (inter-statal) mutual relations lest by the absence of such rules they should relapse into a state of anarchy where "might is right" could lead to "Matsya Nyaya."

Wheaton.—"International Law as understood among the civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice from the nature of the society existing among independent nations, with such definitions and modifications, as may be established by general consent."

Kelson.—"International Law or the Law of Nations is the name of a body of rules which, according to the usual definition, regulate the conduct of the States in their intercourse with one another."

Criticism.—Kelson's definition is criticised on the ground that it did not accept any difference between International Law and Municipal law. In words of Corbett, Kelson asserted a Scientific indifference though not moral or political as between International law and State Monism, but contemporary jurisprudence for the most part deplores this indifference and posists the limitations of the State sovereignty by International law.

Starke.—"International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which State feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also :—

(a) the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with States and individuals ; and

(b) certain rules relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community."

Starke has further pointed out that from the practical point of view, it is well to remember that international law is primarily a system regulating the rights and duties of States *inter se*. Indeed, it is very good practical working rule to regard international law as mainly composed of principles whereby certain rights belong to, or certain duties are imposed upon States.

Hughes.—In the opinion of Hughes, international law is the composite body of principles and rules. All civilised States consider

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these rules as binding upon them. It rests upon the consent of sovereign States. Thus it is the consent of States that work as a sanction behind these rules.

Alf Rose.—International Law is the body of legal rules binding upon States in their relations with one another.

J. L. Brierly.—"International Law may be defined as the body of rules and principles of action which are binding upon civilised States is their relations with one another".

Oppenheim —"Law of Nations or International Law is the name for the body or customary law and conventional rules which are considered legally binding by civilized State in their intercourse with each other."

Criticism —Professor Oppenheim's definition is subject to severe criticism on the following grounds :—

(1) It is now generally recognised that not only State but international organisations have rights and duties under international law ; although they may not have all the rights and duties that State have.

(2) The view of Oppenheim is more controversial but no longer untenable because individuals and other private persons may have some such rights and duties towards international law. After Second World War the main change that has taken place is that from the formal structure of relation of State it is moving towards the interest and welfare of citizens of number of States.

(3) It is now well established that international law consists not only customary and conventional rules but also general principle of law. *Article 38 of the statute of Iniernational Couri of Justice provides "General Principles of Law" as the third source of International Law.*

(4) The very conception that International law is body of rules now stands changed as static and inadequate. Now International law is continuously reinterpreted and reshaped.

Hall.—"International law consists in certain rules of conduct with modern civilized States : regard as binding on them in their relations with one another with a force comparable in nature and degree that binding the conscientious person to obey the laws of his country, and which thev also regard as being enforceable by appropriate means in case of infringement."

Lawrence.—"International Law" according to Lawrence may be defined, "as the rules which determine the conduct of the general body of civilized States in their mutual dealings."

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West Rand Central Gold Mining Co. Ltd. v. *King*, (1905) 2 KB 391. In this case International Law has been described as, "the term of the rules accepted by civilized States as determining their conduct towards each other, and towards each other's subjects".

The Francoina Case.—*R.* v. *Keyn*, (1876) 2 Ex. D. 63.—This case defines International Law as "that collection of usages which civilized States have agreed to observe in their dealings with one another."

The preferential definition.—We have examined above some of the oft-quoted definitions of International Law. Now, let us try to find out which of these definitions accords with the true spirit of International Law. If we judge objectively, our preference is bound to go in favour of Starke's definition because it is more comprehensive and is in more consonance with the modern trends of International Law. It goes beyond the traditional definition of International Law as a system composed solely of rules governing the relations between States only. Such traditional definition of the subject, with its restriction to the conduct of States *inter se*, will be found set out in the majority of standard works on International Law, published before the outbreak of the Second World War. In view of the post-war developments, like League of Nation's United Nations etc., however, it is not a comprehensive description of all the rules not acknowledge to form part of the subject.

Thus on the basis of above definitions, we can sum up following as essential ingredients of International Law :—

(a) International law is a body of rules, principles and usages according to which States carry on their mutual relations in peace as well as in war ;

(b) Consent of nations whether explicit or implied is essential to give the law a binding character ; and

(c) Civilised States as well as citizens inhabiting them become bound to observe these rules.

Q. 2. Where does the importance of International Law lie ? What is the main object of it ? Discuss succinctly.

A. Importance of International Law.—Not only individuals but States also require rules to govern their mutual relations. States, like individuals cannot maintain intercourse with another State without agreeing upon certain rules of conduct by which they may advance their common interests and avoid conflict among themselves. This concept gave the birth of International Law. The maintenance of order in the world community of States is

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rendered possible only by a legal order evolved out of the necessities of situations that have arisen in the course of mutual dealings between States. International Law supplies such a legal order and governs the relations between independent States. Its importance lies in the realisation on the part of the States that they are incapable of remaining isolated from each other and that their adherence to law based on principles of justice and fair dealings is indispensable for maintaining good relations.

Importance of International Law can best be summarised in the words of Starke who says, "International Law, as we know it today, is that body of rules regulating for the most part the relations between States, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationship. In the absence of some system of international Law, the international society of States could not enjoy the benefits of trade and commerce, of exchanging ideas, and of normal routine communication."—*Starke, 6th Ed.* Thus International law constantly evolving body of norms that are commonly observed by the members of International community in their relation with each other. These norms confer rights and impose obligations upon States and to a lesser extent, upon International organisations and individuals.

Main Object of International Law.—The main object of International Law has been to produce an order rather than a just system of international relations. However, justice has not completely been out of its consideration. In the modern law of nations there is a tendency to ensure not only order but justice also. In the latter development in the international fields there has been evidence of some striving to ensure that, objectively, justice be done between States. Moreover, apart from seeing that States receive just treatment. the modern law of nations aims as securing justice for human beings. It is significant further that the word "justice" appears in the titles respectively of the Permanent Court of International Justice and its successor the International Court of Justice, both being judicial tribunals set up to decide disputes between States and to give advisory opinion according so International law. There are several references to "justice" in the Charter of the U. N. O.

Conclusion.—Thus we say that though the main object of International Law has been to achieve the goal of ordered world community, there seems to be a shift in the emphasis or at any rate, demand from International Law that it should not only bring about and maintain order but also just relations in the family of nations. So we can say that the object of International Law is to ensure law and order leading ultimately towards justice in the international relations.

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Q. 3. (a) Distinguish clearly between "Private International Law" and "Public International Law". P C S. 1974.

(b) What do you mean by 'General' and 'Regional' rules of International Law ? Discuss briefly.

A. (a) Public and Private International Law.—Before we attempt a distinction between 'Public' and 'Private' International Law, it is desirable to know the meaning of these expressions. Wherever and whenever the expression "International Law" or "the law of nations" occurs, it should (unless the context requires otherwise) be taken to refer to Public International Law and it is only in this sense that the words 'International Law' have been and are used. Private International Law has been defined by *Pitt Corbett* as "the body of rules for determining questions of jurisdiction and questions as to the selection of the appropriate law, in civil cases which present themselves for decision before the courts of one State or country, but which involve a foreign element, i. e., which affect foreign persons or foreign things or transactions that have been entered into wholly or partly in a foreign country or with reference to some foreign system of law". *Prof. Dicey* prefers to call Private International Law as "the Conflict of Laws" since it deals with the rule regulating cases in which municipal laws of different States come into conflict. Such conflict may arise in connection with domicile, marriage, divorce, wills, validity of contracts, etc. Private International Law is also known as "inter-municipal law." "International comity" and the like. Thus private International law is that branch of International Law which decides the dispute between the International Community applicable on the matter in dispute. The main distinction between the Public International and Private International Law are as follows :—

Distinction

Public International Law is quite different from the Private International Law. The distinction is based on the following facts:—

(a) (1) Public International Law is of universal character and it comprises of rules generally recognized by States in their mutual relations but Private International Law is essentially a part of the Municipal Law of a State. In other words, Private International Law is a horizontal cross-section of the various laws of a municipal legal system whereas Public International Law is the Law between States.

(2) Public International Law generally deals with the relations of State with each other whereas Private International Law primarily concerns itself with the civil rights and duties of individuals.

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Private International Law deals mainly with the following three problems :—

(i) When there is a case having a foreign element, whether the Municipal Courts of the States can exercise jurisdiction over such case.

(ii) On accouut of the foreign element, if the legal dispute is connected with different systems of law, which of the systems of law is to be applied, and

(iii) Under what conditions and to what extent should the Courts of a State recognize and give effect to a foreign judgment.

(3) According to *Sir Robert Phillimore* rights arising under Public International Law are called absolute, or rights *strictii juris* and their breach constitutes a *casus belli*, and justifies in the last resort a recourse to war, whereas Private International Law—the rules of which are founded upon convenience and intended to facilitate the intercourse between the subjects of different States—confers no absolute rights.

(4) Public International Law is not not generally the out-come of the legislation of an authority which is above the States whereas basis of Private International Law is legislation of the Individual States.

(5) Public International Law finally decides and regulates the relation of States among themselves whereas Private International Law is inconclusive in its very nature. It does not settle the matter finally but only suggests a method of choice of jurisdiction and of law.

(6) International Law comprises mainly the rules which are recognised by the civilized States in their relation with each other and arises out of International customs and treaties. On the other hand, Private International Law is framed by the Legislature of the State and recognised by the State Courts.

(7) Private International Law determines the Courts which has jurisdiction to decide the disputes in question. In this respect it differs from Public International Law also.

Inspite of the above distinctions in the nature and contents of Public and Private International Law, there is also some similarity between the two.

Oppenheim has rightly observed that inspite of the sharp distinction between them, there is also a sphere common to both Public and Private International Law. For example, the question of diplomatics is a question forming part of both Public and Private

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International Law. Of late, many rules of Private International Law are outcome of multi-partite conventions. Though rules of Private International Law are municipal in form they may be universal in substance. Therefore *Prof. Jessup* thought it fit to call this new branch of law, which has the mixed characteristics of Public International Law and Private International Law as "Transitional Law."

(b) General and Regional Rules of International Law.—There is a recognised distinction between *general* and *regional* rules of International Law, that is to say between, on the one hand, rules which are of universal application and on the other hand, rules which developed in a particular region of the world, as between the States there located, without becoming rules of a universal character. The best illustration of such regional rules are those which have been commonly followed by the group of Latin American States, for example, the special rules relating to diplomatic asylum. This so-called "Latin American International Law" and the nature of regional rules were discussed by the International Court of Justice in the *Colombian-Peruvian Asylum* case, (1950) I.C.J. Reports, p. 266. According to the judgments in the case :—

(1) Regional rules are not necessarily subordinate to general rules of International Law, but may be in a sense "complementary" or "correlated" thereto and (2) an international tribunal must, as betweeen States in the rules particular region concerned, give effect to such regional rules as are duly proved to the satisfaction of the tribunal.

In this connection, there may also be noted the modern tendency towards regionalism in international organization which reeflected in the conclusion of regional security treaties (for example, the North Atlantic Security Pact of April 4, 1949), the creation of regional international organs (for example, the South Pacific Commission established in 1948), and the establishment of regional international tribunals (for example, the Court established by Articles 31-45 the Treaty constituting the European Coal and Steel Community of April 18, 1951).

Q. 4. Discuss briefly the present day status of International Law ?

A. Now the question is how far we know and understand International Law these days. International Law as we know it today, is that indispensable body of rules regulating for the most part of the relations between States, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system International law, the

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international society of States could not enjoy the benefits of trade and commerce, exchange of ideas, and of normal routine communication.

It is true that in some quarters there is a tendency to disparage international law, even to the extent of questioning its existence and value. There are two main reasons for this :—

(i) generally, view is held that the rules of International Law are designated only to maintain peace, and

(ii) ignorance of the vast number of rules, which, unlike the rules dealing with "high policy", that is issue of peace or war, receive little publicity.

As a matter of fact, however, a considerable part of International Law is not concerned at all with issue of peace or war. In practice, legal advisers of foreign officers and practising international lawyers daily apply and consider settled rules of International Law dealing with an immense variety of matters. Some of these important matters which arise over and over again in practice are claims for injuries to citizens abroad, the reception or deportation of alienee, extradition, questions of nationality, and the interpretation of the numerous complicated treaties or arrangements now entered into by most States with reference to commerce, transport and other subjects.

Branch of International Law resulting in wars or conflicts of aggression tend to receive adverse attention, and from them the public incorrectly deduces the complete breakdown of international law. The answer to this question is that even in war time there is no absolute breakdown of international law, as many rules afflicting the relations of belligerents *inter se* or with neutrals are of vital importance and for the most parts are strictly observed.

It is possible to argue for those that in municipnl law (that is State law) breaches, disturbances and crimes take place, but no one denies the existence of law to which all citizens are subjects Similarly, the recurrence of war and armed conflicts between States does not necessarily involved the conclusion that international law is non-existent. Finally, it is incorrect to regard the maintenance of peace as the entire purpose of International Law.

Q. 5. "International Law a true law or is it simply international morality." PCS 1969, 1984.

Or

"International Law is law in the making".—(Jethro Brown). Do you subscribe to this view ? Discuss giving reasons.

Or

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"International Law is law by analogy".—(Holland). Comment.

Or

"International Law is law by courtesy"—(Holland). Discuss critically.

Or

International Law is a system without sanctions (I.A.S. Exam. 1974).

A. Introduction.—Almost for the early stages of the science of International Law, there has been much speculation about the juristic nature of the system. Pedantic objections have been raised against International law being regarded as 'law' in the full sense of the term. This doctrinal dispute has taken such a fierce shape that it almost confuses the student of International Law as to the real nature of the systsm. We come across extreme views on this controversial point. Opinions are sharply divided. One set of jurists denies any legal character to international Law whereas the other set regards it law in the fullest connotation. Yet, there is no dearth of jurists who have choosed the middle line. But it may be noted that the rule of morality is a rule which applies to conscience only and cannot be enforced by external power. While on the other hand rule of law can be enforced by external power. So there is now general agreement about the binding nature of International Law whereas a rule of morality is not binding.

The controversy has its origin in the weaknesses of the International law and the meaning one assigns to the term 'law' itself. Before we enter into the discussion, let us point out the weakness of International Law which have been the main target of attack. According to *Pitt Cobbett* as between States which are independent, there can, of course, be (i) no common law-making body having power to bind them by its decrees, (ii) nor is there any common Tribunal except the International Court of Justice at the Hague, having power to interpret and to apply law as between parties at variance, (iii) nor is there any common executive having the power at once to compel resort to the tribunals and give effect to their judgment. For these reasons international Law is not only less imperative and less explicit but it also lacks the coercive force of the state law. These weaknesses are due, as *Openheim* admits, to International Law being 'law between' States and not 'above them'.

Arguments against International Law.—The rapid changes in different fields have brought a sense of crisis in International Law. The crisis is a product of the acceleration of the process of change in the International Law community is characteristics of our era.

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And the factors responsible for this crisis include rapid technological progress, the rise of the new ideologies and systems of public order, including militant communism, decolonzation itself. The main attack against International Law has come from the adherents of the "Analytical School of Jurisprudence" led by John Austin. Others who questioned the true legal character of International Law have been Hobes, Pufendorf, Jeremy and Jethro Brown.

Austin.—Denied any legal force to International Law. His attitude towards International Law was coloured by his theory of law in general. He defines "law" as "body of rules for external human conduct set and enforced by a sovereign political authority". According to the Austinian theory, law was the result of edicts issuing from a determinate sovereign legislative authority. Logically, if the rule concerned did not in ultimate analysis issue from a sovereign authority, which was political superior, or if there were no sovereign authority, then the rules could not be legal rules but rules of moral or ethical validity only. Applying this general theory to international law, as there was no visible authority with legislative power or indeed with any determinate power over the society of States, and as in his time the rules of international law were almost exclusively customary, Austin concluded that International Law was not true law but "rules of positive morality" (as if morailty were a depreciatory epithet only, analogous to the rules binding a club or society. He further described it as consisting of "opinions or sentiments current among the nations generally", [*See* Austin *Lecture on Jurisprudence*. 4th Edition, revised and edited by R. Campbell 1873, Vol. 1, at pp. 187, 188, 222).

J. G. Starke refutes Austin's arguments against the legal character of the rules of International Law, saying :—

(1) Austin's definition of law as a command of a sovereign is inapplicable to modern conditions and hence wrong ;

(2) The absence of sanction behind rules of International conduct is offset by the establishment of international institutions, which enforce the rules and prescribe penalties for their breach ;

(3) Nations are gradually accepting the rules of international relations as part of their municipal law ;

(4) States give their consent to them and observe them as laws ;

(5) Before admitting to membership of the community of Nations. State require the admission-seeking State to agree to the observances of all the rules of International law and not only such as that State may like.

Even when the State violate the rule of International law, but

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they do not deny the existence of law, and always try to justify their conduct and affirm the binding nature of rule of International law.

Holland.—The chief amongst the protagonists of Austin's authority, shows utter disrespect to International law. He goes even one step further than his master in denouncing International Law. He describes International law as "law by courtesy". Both parties are judges of their own course. Law without any arbiter is contraction in terms. It is impossible to regard these rules as being, in reality anything more than "the moral Code of Nations..... International Law is law only by analogy." In his oft-quoted remark, Holland calls International Law as "the vanishing point of jurisprudence." Justice V R. Krishna Iyer, formerly member of Indian Law Commission has also remarked, "It is a sad truism that International Law is still the vanishing point of jurisprudence." But it is now generally agreed that Holland's view that International Law is the vanishing point of jurisprudence is not correct. Hollands view is based on the proposition that there are no sanctions behind Intetnational Law.

Savigny.—Savigny calls International Law as "imperfect positive law".

According to Lord Salisbury.—"It (International law) can be enforced by no tribunal and, therefore, to apply to in the phrase 'law' is to some extent misleading."

In *R.* v. *Keyn*, (1876) 2 Ex. D. 68, the Court observed, "Strictly speaking, International Law is an inexact expression and it is apt to mislead, if its inexactness is not kept in mind. Law implies a law giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law giver to sovereign States ; and no tribunal has the power to bind them by decrees or coerce them if they transgress."

Arguments in favour of international Law.—The above criticisms of International Law have been repelled by Oppenheim, Starke, Brierly, Hall, Lawrence, Pollock, Maine and a host of other authorities. The decision as to the legal nature of International Law much depends, upon the meaning of the term 'law' itself. According to Oppenheim, International Law is "a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power." So conceived, the essential conditions for the existence of law are : (i) a community, (ii) a body of rules for human conduct within the community, and (iii) common consent of the community that these rules be enforced by external power. . The chief exponent of this theory are Antizilloti, Triepel and Oppenheim. But this theory fails to explain the basis of customary International Law.

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As pointed out by Starke, in practice, it is not necessary to prove that the other States have given their consent in regard to a specific rule of International Law. Now, we should test the validity of the International Law within the framework of this definition.

(a) That the family of nations is a community cannot be doubted since innumerable are interests which knit together and which create constant intercourse amongst individual of civilized States and their subjects.

(b) The family of Nations is a community with rules of conduct both customary (like those regarding the diplomatic immunities) and conventional ; e. g., (The Declaration of Paris of 1856 ; The Hague Regulations of 1892 and 1907 ; The Geneva Convention of 1949 etc.., etc.).

(c) Nor does International Law lack sanctions. They range from the vigilant and evergrowing public opinion, the sanction of the U N., the attempts at the establishment of collective security intervention by sympathetic States, to the last argument of States—violence, self-help and consequent war.

At present no State can keep itself apart from the affairs or activities of the world. Because due to development of transport and communication and other scientific inventions have brought the world more and more closer to each other.

Thus, for International Law within the definition and spirit of law, we are now able to advance further arguments in favour of International Law along with check-mating the Austinian view in the course of our discussion. The points which go to support the juristic nature of International Law are given below :

1. In the words of *Sir Frederick Pollock* : If International Law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their strength on moral argument. They appeal not to the general feeling of moral rightness, but to precedents, to treaties, and to opinions of specialists. They assume the existence among statesmen and publicists a series of legal as distinguished from moral obligation in the affairs of nation's —*Pollock* ; *Oxford Lectures* (1890), p. 18. Brierly also supports the juristic nature of International Law by citing the invasion of Belgium, 1914, and the bombardment of Corfu in 1928.

2. Modern historical jurisprudence has discounted the force of Austin's general theory of law. It has been shown that in many communities without a formal legislative authority, a system of law was in force and being observed, and that such law did not differ in its binding opertation from the law of any State with a true legislative authority.—*Starke*.

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In *West Rand Central Gold Mining Co., Ltd* v. *Rex*, (1905) 2 K. B. 391 Lord Alverstone, C. J. held it to be true that International law formed a part of the law of England and that whatever had received the common consent of the civilised nations must be called International Law, and would in that character be acknowledged and applied by English Municipal Tribunals.

3. Certain countries indeed in practice expressly treat International Law as possessing the same force as the ordinary law binding their citizens. Under the Constitution of the U. S A., for example, treaties are "the supreme law of the land" (Article VI, Sec. 2)

4. The legally binding force of International Law has been asserted again and again by nations of the world in International conferences. To take one illustration, the Charter creating the U.N.O. drawn up at San Francisco in 1945 is both explicitly and implicitly based on the true legality of International Law.

5. "Violations of International Law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation and that they have a right to act as they do according to the law of nations, or at least that no rule of nations is against their acts. The fact is that States while breaking the law of nations, never deny its existence, but recognize its existence through the endeavour to interpret the law of nations as justifying their conduct. And although the frequency of the violation of International Law may strain its legal force to breaking point the formal, though often cynical affirmation of its binding nature is not without significance "—*Oppenheim*.

6. According to *Lord Russel of Killowen*, "International Law properly so called is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations with one another."

7. *Sir Henry Maine*, while criticising the Austinian conception of law, observes, that "men do sometimes obey rules for fear of punishment but compared with the mass of men in each community this class is but small, probably it is confined to those what are called the criminal classes. The largest number of rules which men obey are obeyed unconsciously from a mere habit of mind." Thus Austinian theory fails to account for the customary rules of International Law, and if we follow the Austin's theory common law of England will lose its legal validity, which are mostly followed in the world.

8. No doubt, International Law is less explicit and less imperative than the State law but nevertheless it is law inasmuch as it is enforced partly by the conviction that it is good and partly by

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those subtle influences which make it difficult for a man or body of men to act in defiance of strongly held views of those with whom they associate. Compulsion alone is not the sanction behind law. It is enforced by consideration of justice as much as of force. The element of fear is also not absent. Nations are afraid that a gross violation of International rules of conduct might make the nemesis fall upon them. The "enforcement measures" envisaged in U.N. Charter are such sanctional provisions The part played by International Law in Korea and Suez Canel crisis is ample proof of binding nature.

Conclusion.—The above discussion shows that International Law is a true law. "States may often violate International Law, just as, individuals violate municipal law, but no more than individuals do, State defend their violations by claiming that they are above the law."—*Brierly*. The view of Brierly is endorsed by Sir Cecil Hurst alse. Almost all modern writers on International Law regard International Law as true law.

But in spite of these learned agruments, an age which has been disillusioned by the fates of Abyssinia, China, Spain, Austria, Czechoslovakia, Poland, Finland, Manchuria, Hungary, and recently of Congo, the lipservices paid at the Untited Nations, the mockery of summit-talks, dismal failure or disarmament conference, the display of power politics by the two rival blocks, and the continuance of racial discrimination by South Afriea and other States, hardly distrusts the words of *Jethrow Brown* that "International Law is law in the making, law struggling for existence, struggling to make itself good in contradistinction from international morality." The above observation of *Jethrow Brown* contains a hard truth, a naked truth, a bitter truth and International Law lacks a potent judiciary. The power and jurisdiction of the International Court of Justice are very limited. Much depend on the sweet will of the dominating States, and its decisions are binding on the parties concerned and no others.

Q. 6. "The modern system of International Law is a product, roughly speaking, of only the last four hundred years." Comment and discuss.

A. It is correct to say that modern system of International Law is a product, roughly speaking, of only the last four hundred years, It grew to some extent out of the usages and practice of modern European States in their intercourse and communications, while it still bears witness to the influence of writers and Jurists of sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concept, such as, rational and territorial sovereignty, and the perfect equality and independence of States, that owe their force to

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political theories underlying the modern European State system, although curiously enough some of these concepts have commanded the support of newly emerged non-European States. Any historical account of the system must begin with earliest times. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of christianity, for example, in ancient Egypt and India, although it would be wrong to regard these early instances as representing any serious contribution towards the evolution of the modern system of International law.

Actually, the total direct contribution of the Greeks and Romans to the development of International Law was relatively meagre. Profound alteration occurred in the fifteenth and sixteenth centuries. Moreover as aptly remarked by Dias :—"No other firmament of legal or political theory is to be jewelled with stars as that of Natural law for it has engaged the attention of some of the greatest-thinkers of all the age." Credit of giving the birth of Natural law must go to Greeks and after Greeks, Romans further developed it. The early and original law of Roman was called '*Jus Civile.*' Later on they developed legal system called as '*Jus Gentium.*'

With the growth of number of independent States there was initiated, as in early Greece, the process of formation of customary rules of International Law from the usages and practices followed by such States in their mutual relations. These developed a number of customary rules relating to diplomatic envoys.

By the fifteenth and sixteenth centuries jurists had begun to take into account the evolution of a community of sovereign State and to think and write about different problems of the law of nations realising the necessity for some body of rules to regulate certain aspects of the relations between such State. Where there were no established customary rules, these jurists were obliged to devise the working principles by reasoning or analogy.

By general acknowledgment the greatest of the early writers on International Law was the Dutch Scholar, jurist, and diplomat Grotius, whose systematic treatise on the subject first appeared in 1625. On account of this treatise, Grotius has sometimes been described as the "father of the law of nations." Grotius has had an abiding influence on the history of International Law.

The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern State system in Europe.

In the nineteenth century International Law further expanded. This was due to a number of factors which fall more properly within

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the scope of historical studies, for instance, the further rise of powerful new States both within and outside Europe, the expansion of European civilization overseas, the modernisation of world transport, the greater destructiveness of modern warfare and the influence of new inventions. All these made it urgent for the international Society of States to acquire a system of rules which would regulate in an ordered manner the conduct of international affairs. In this connection communist challenge is to be noted, which was represented by Soviet Union and China.

It may be noted that the theory of Inrenational Law regards treaty or agreement which are only appropriate method for effecting changes and development of International Law ; These countries have no consideration about the custom and express that custom as inadequate and insignificant for the development of international law. The Soviet attitude towards international law is the product of 'the combined pressure of need and Marxist doctrine'. There was a remarkable development during the century in the law of war and neutrality, and the grant increase in adjudication by international arbitral tribunals.

Other important developments have taken place in the twentieth century The permanent Court of Arbitration was established by the Hague Conference of 1899 and 1907. The Permanent Court of International Justice was set up in 1921 as an authoritative international Judicial tribunal and was succeeded in 1946 by the present International Court of Justice.

Above all, there is the present unprecedented political state of affairs, for which the traditional system of International Law was not devised. The International Law is now called upon to find new rules to govern the fields of nuclear and thermo-nuclear energy, and scientific research generally, and to regulate State activities in the upper atmosphere and in the Cosmos. International Law today, is that indispensable body of rules regulating for the most part the relations between States, without which it would be virtually impossible for them to have steady and frequent intercourse.

Q. 7. "International Law is the vanishing point of jurisprudence"—(Holland). Is it a correct estimate of International Law ? Explain the statement and offer your own comments thereon. (I.A.S.—1948 and 1957, P.C S. 1972 P.C.S. 1990).

A. The statement explained.—Holland describes International law as "law by courtesy." Both parties are judges of their own cause. Law without any arbiter is contradiction in terms. It is impossible to regard these rules as being, in reality, anything more than "the moral Code of Nations ..... International Law is law by analogy". In his oft-quoted sentence

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he further calls International Law as "the vanishing point of Jurisprudence."

Holland assigns two reasons for calling International Law as "the vanishing point of jurisprudence" i. e., first because it lacks an arbiter above the parties themselves (hence not law at present), and secondly because in proportion as it tends to become assimilated to true law by the aggregation of State into a larger society (super State) it ceases to be itself and is transmuted into the public law of a federal Government." The law which cannot be enforced by a superior authority cannot stay longer. The law which lacks sanction to get compliance to it cannot but fade away into oblivion. International Law has no machinery and no sanction to punish its transgressor and hence it connot maintain its existence due to its frequent violations with impugnity. But it is wrong to say that there are no sanctions at all in International Law ; Even if we think that there are no sanctions in International Law because as pointed out, sanction is not the essential element of law. Violations of International Law are certainly frequent during war especially, but the offenders always try to prove that their acts do not constitute a violation.

Holland's view is shared by many authorities, for example, *Lord Salisbury* remarks, "It (International Law) can be enforced by no tribunal and therefore to apply to it the phrase 'law' is to some extent misleading." Justice V. K. Krishna Iyer has also remarked, "It is a sad truism that International Law is still the vanishing point of jurisprudence". (See "Mass Expulsion As Violation of Human Rights", I. J I. L. Vol. 13, page 169). When one sees the practical working of the present day International Law, he is inevitably led to the conclusion arrived at by *Holland*. States bave scant regard for International Law. They place their self-interest above everything. Particularly war time States throw all cannons of International Law to wind.

So having regard to the absence of any established legislative, executive and judicial organ of International Law and frequent disregard of international rules, Holland's remark appears to be true.

Comments.—Holland's observation is an outcome of his being the adherent of Austinian theory of law. Austin and his partisans doubted the existence of International Law because it does not fall within the four corners of their theory of a law. According to Austinian theory every law is a command issue and enforce by the sovereign power. Judged by this standard, International Law appears to be "Vanishing point of jurisprudence." Holland's view has been vehemently criticised by the protogonists of International Law. The Austinian theory which is the basis of Holland's

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view stands exposed now and does not command universal acceptance.

Let us examine observations controverting Holland's view :

1. Holland regards International Law as the vanishing point of Jurisprudence because in his view, there is no Judge or arbitrator to decide international disputes and the rules of International Law are followed by the States in courtesy. This view is far from the truth in view of the developed and changed character of International Law today. It is worng to say International Law is without a Court of Law to decide International dispute because the establishment of Permanent Court of International Justice under the League of Nations and thereafter International Court of Justice which is the successor of Permanent Court of International Justice.

2. According to *Sir Henry Berkley, C. J.*, "In my opinion, a law may be established and become international, that is to say, binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot be overcome. Such resistance makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possesses for the time being power to exist an established municipal law, such law had no existence? The answer to such a contention would be that the law existed, though it might not for the time being be possible to enforce obedience to it."

3. **Brierly** observes, "The existence of some kind of International Law is simply one of the inevitable consequences of this coexistence in the world of a plurality of States necessarily brought into relations with one another. The best evidence for the existence of International Law is that every actual State recognises that it does exist and that is itself under an obligation to observe it."

Conclusion—Holland's observation is so pessimistic and without substance that no one easily endorses it. The view which he took may be rather true in his own age but it cannot find support now. International Law is being strengthened internationally. Various law-making treaties, resolutions of the International Law Commission, the resolutions of the General Assembly of the U. N. O. all go to supply the legislative part of the International Law. International Court of Justice at Hague adjudicates upon the disputes between States and the "enforcement measures" and the principle of

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"collective security" provides sanction behind International Law. However, it must be admitted that International Law is a weak law but it does not mean that it does not exist and has no future. The future of International law is bright. Hence the dictum that International Law is "the vanishing point of jurisprudence" is uncalled for and is one sided. The true position may be summed up in words of Paton when he says, "it is too narrow to say that International Law does not exist but in the present state of civilization it is tragically ineffective."

(Please see Question 5 also).

Q. 8. Why in International Law a weak Law ? Suggest ways and means to improve it. (P.C S. 1972).

A. Weaknesses of International Law.—The cumulative evidence against the position taken by Austin and his followers should not bind us to the fact that International Law is a weak law. It is mainly customary. Existing International Legislative machinery is not comparable in efficiency to State legislative machinery. In spite of the achievement, the United Nations in re-establishing a World Court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between States. Finally, many of the rules of International Law can only be foamulated with difficulty, and, to say the least, are quite uncertain—*Starke*.

In the *Queen* v. *Keyn*. Lord Coleridge observed : Law implies a law giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law giver to sovereign States and no tribunal has the power to bind them by the decrees or coerce them if they transgress.

According to *Brierly*, "The two most serious short-comings of the present system are the rudimentary character of the institutions which exist for the making of and the application of the law, and the narrow restrictions on its range."

Paton observes, International law "is very weak on the institutional side—there is no legislature, and while a court exists, it can act only with the consent of the parties and has no real power to enforce its decisions. It is true that International Law of peace is seldom broken, but once grave issues arise we see flagrant disregard of accepted rules. The public opinion of the world may be a factor not lightly to be ignored, but it is harder to deal with a nation that is a law-breaker than to expel a primitive man from his community hence while primitive and International Law both lack institutional machinery, the sanction of the former are really more effective since they are brought to bear on the individual and not on the nation."

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"International Law found in most part is unwritten and lacks sanctions"—*Lords J.* in the *S. S. Lotus*.

Pitt Cobbett also shares the above remarks. He observes, "As between States which are independent and legally equal there can be of cource no common law-making body having power to bind them by its decrees nor is there any common Tribunal except the Internatianal Court of Justice having authority to interpret and apply law between parties at variance, to compel resort to the tribunal and to give effect to their judgment. For these reasons International Law is not only less imperative and less explicit than State law, but it also lacks the coercive force of State law".

Conclusion.—Thus we can conclude on the basis of above discussion and on following reasons that International Law is a weak law :—

(1) It is chiefly customary and hence unwritten.

(2) The present international legislative machinery is not adequately efficient to keep it abreast of the growing needs.

(3) Although there is the International Court of Justice there is no universal compulsory jurisdiction for settling legal disputes between States.

(4) Many of the rules of International Law are quite uncertain.

(5) Looking to the present trend towards a world federation, International Law, in the form it is today, is not wide enough to meet the requirements of the world thus International Law has failed to maintain order and peace in the world. Recently, International Court of Justice could not decide the disputes of Iran and America in connection with the 57 people of America of great importance.

(6) Absence of codification.

(7) International Law does not authorize the family of the nations or, for the matter, an international organization to intervene in the matters which are essentially within "the domestic jurisdiction" of a State and this limits its jurisdiction and influence. The U. N. O. has jurisdiction to interfere within the domestic jurisdiction even when a State violates any matter likely to lower the human dignity or status or even when it affects the interest of other States. A more serious limitation on the range of International Law is that international economic relations fall within the sphere of domestic jurisdiction. Tariffs, bounties, trade markets and the like are the matters which, although falling outside the ambit of International Law underlie the rivalries of modern States and provide the causes of their disputes.

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(8) Reluctance of States to submit to International Law if it is against their interest is a great hindrance to its growth and development. As observed by *Schwarzenberger*, "The subjects of International Law are highly self-centred and not inclined to delegate to the international society functions which however inadequately, they themselves can discharge, and their ultimate reliance on their own power is not congenial to the growth of either a comprehensive or strong legal system."

(9) *Oppenheim* attributes the weakness of International Law to its being law 'between' and not 'above' the States.

(10) Last but not least, International Law lacks an effective executive machinery to enforce its rules.

How to improve International Law

Schwarzenberger suggests four possible approaches to improve International Law :

(1) Reform or Restatement.—The first approach is that of restatement or reform of International Law. It is pointed out that the restatement of the existing International Law is liable to restrict its improvement and hence not helpful. Moreover, every reform of law should be related to the type of international order without which it is bound to fail The U. N. O. has adopted the Bill of Human Rights but it has been practically useless on account of absence of the world State.

(2) Codification.—Codification means a systematic presentation of the rules of law. Attempts have been made to codify International Law by the League of Nations, the United Nations and various other agencies but there has been no satisfactory progress. Such attempts have done positive harm in certain cases. Common Law pattern signifies that the decisions of international judicial institution should have more than persuasive authority.

(3) More goodwill among States.—In order to strengthen International Law it is very essential that there should be more co-operation and a keener desire for peaceful existence among the States. Cold-war tactics should give into a sense of world brotherhood.

(4) More respect of law and order.—The States pay scant regard to international rules and this is greatest obstacle in the way of International Law. This habit should be given up.

(5) In addition to above reformative steps mentioned by *Schwarzemberger* it is also essential that enforcement measures must be strengthened. As remarked by Dr. Negendra Singh (recently elected as the judge of International Court of Justice), "Two basic pillars are necessary for the establishment of Public order : the

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existence of proper law and the machinery for enforcing it, including the sanctions behind the law. In the inter-State sphere, order can be maintained if there is in existence a well-defined and well-codified international law and an effective agency to enforce it."

(6) The International Court of Justice must be given compulsory jurisdiction over all international disputes and for criminal cases International Court of Criminal Justice must be created.

(7) The powers of International Law Commission should be expanded in order to suggest ways to make International law more adoptable in accordance with the changing times and circumstances.

(8) In order to strengthen the International law, the doctrine of judicial precedent should be applied.

(9) The General Assembly must be empowered to make, alter and revise the law.

(10) An International Criminal Court should be established to adjudicate cases relating to International crimes.

(11) An International Police System should be established to check international crimes and to enforce the rule and principle of International law.

(12) In order to intervene in States matter United Nation's Charter should be amended, which affect the International Community.

Q. 9. What is the santion benind International Law ? (I.A.S. 1975, 1974 and 1964).

A. It is very difficult to say whether there is sanction behind the International Law or not. Opinions are divergent about it. According to one view, there is no sanction in the International law. According to another view, even if there is no sanction, it is a law because sanction is not an essential element of law. There is also another view which holds that the International law is not without sanction.

According to Kelsen, law is a coercive force. The force may be either in the form of sanction or delinquency. In the International Law, a sanction or delinquency is sanction.

Starke who has supported about the sanction behind International Law pointed out following reasons for it :

(a) Under the United Nations Charter, if there is any threat to the international peace and security or an aggression has taken place the Security Council can take necessary action to maintain international peace and security.

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(b) The decisions of the International Court of Justice are binding on the disputing parties.

(c) The Charter of the United Nations stipulates that the member States have undertaken that they shall respect the technical integrity and independence of each other and shall not use force against each other.

According to Starke, if the word 'sanction' to be taken in larger sense of measures, procedure and expedients for exercising pressure upon a State to comply with its International obligations, then the above provisions of U. N. Charter are not exhaustive of the sanctions which may become operative in different fields of International Law.

Thus it cannot be denied that there is no sanction behind the International law. Though these sanctions can be used to maintain peace and security, yet these come within the sphere of the International law.

Sometime the acts of a particular State in violation of the International law may be regarded by other States as illegal and inoperative. Reference may be made here to the Advisory opinion of the International Court of Justice on the legal consequences of States of the continued presence of South Africa in Nambia (1971) in which it was held that the acts of South Africa in Nambia are illegal and the member States are under obligation to refrain from doing any act which may recognise legality of its presence in Nambia.

Similarly, Article 14 of Convention on Narcotic Drugs, 1961, provides that if a party to the Convention fails to carry out the provisions of the Convention, the International Narcotic Board is entitled to call for explanation and if the explanation is unsatisfactory, the Board may call the attention of other competent U.N organs to the position and may even recommence a stoppage of drugs imports or exports or both to and from the country or territory in default.

Q. 10. "Common consent of the family of nations is the basis of International Law"—Oppenheim. Do you accept the above view as correct ?

Or

Discuss fully the theories as the basis of International Law. Which of these would you advocate as suitable in modern times ? [I.A.S. Exam 1973 and 1975, P.C.S. 1977, 1990].

There are following views as to the theory of basis of International Law ;

A. Consent theory.—Oppenheim took the view which is shared

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by some other jurists that the common consent of the States is the basis of International Law. In order to support this theory, the consent of the States is the basis of International law. According to this theory States are bound to observe the International law because they have given their consent. Despite Oppenheim the exponent of this theory are Anzilotti, Triepel etc. But this theory fails to explain the basis of customary International law.

The 'Consent' Theory, however, is untenable for the following reasons :

(a) The theory is simply inadequate to explain the assumptions upon which Governments appear to have acted for the very beginning of International law. Whatever the position taken by writers, Governments have always looked upon International Law. as having an objective character ; as being binding because it was 'the law' not because States found it to their convenience to observe it.

(b) The 'consent' theory envisages the possibility of a State refusing to give its consent to be bound by the rules of International Law. In such a case, where the State by reason of being a State is forced to agree to be bound by the rules of International Law, the question of consent hardly arises.

(c) The argument advanced by the supporters of the 'consent' theory that recognition of a State by other States implies a consent on the part of the recognized State is altogether fallacious."..... recognition is an admission by other States that a particular community fulfils the condition and possesses the qualifications required of a State. The act of recognition is the act of the other States—not the act of the State to be recognised"—*Cecil Hurst.*

(d) "It is not necessary in practice when invoking a particular rule of International Law against a particular State to show that the rule is one generally recognized by the society of States"—*Starke.*

(e) There are great practical difficulties in the acceptance of the 'consent' theory. According to it, the obligatory nature of the International Law depends on the existence of consent. The factum of consent will be required to be proved in all international disputes. In the case of large number of States there is no record of any such consent and no proof is forthcoming. Moreover they are bound to be a lot of procedural difficulties in the way of such proof.

(f) "States" are bound by general International Law without and even against their will. Thus for instance a new State, as soon as it comes into existence has all the rights and all the duties stipulated by general International Law without any act of recognition

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of general International Law on the part of this State being necessary. Just as the individual does not submit voluntarily to the law of the State which is binding upon him without and even against his will, a State does not submit voluntarily to International Law which is binding upon it whether it does recognise International Law or does not recognise it"—*Kelsen*.

True basis.—It is not consent but the exigencies of modern life which provide the binding force to International Law. No State these days can exist in isolation. It must for various reasons maintain constant relations with other States. Mutual relations of States are necessary to be regulated and herein comes the need of International Law. "The result is that a State cannot escape from subjection to International Law, or to put it slightly differently, International Law is the necessary concomitant of Statehood. International Law is, in fact, bindiug on States because they are States. This is not perhaps a very surprising position to which to attain because it must be remembered that our modern conception of a State is itself the creation of International Law and it is by the canons of International Law that the rights and duties of a State are defined"—*Sir Cecil Hurst*.

Conclusion.—Thus, we see that the theory of consent cannot explain the true basis of international law and can be criticised. As pointed out earlier, State follows the law because for the simple reason they are State. *Sir Cecil Hurst* again observe, that International law is, in fact, binding on the States because they are States. Threfore consent can never be the ultimate force of legal obligation. *Fenwick* sums up conclusion in the following passage :

"The prevention of war, the regulation of conflicting claims, the promation of the general welfare of the group, are conditions which create a moral and material unity among the nations in the same manner that they create a moral and material unity between individuals within the State. The fact that nations have these common interests constitutes an actual commnnity of States and at the same time imperatively demands of a rule of law ; so that International Law may be said to be based upon the very necessity for its existence upon the very human beings in constant contact with one another under the conditions of the present day".

Q. 11. 'International law can in logic be reduced to a system of rules depending for their validity only on the fact that States have consented to them.' Discuss their statement, examining the merits and defects of 'positivism.' (I. A. S. 1969, 1974, 1977, Q, No. 3 (a), P.C.S. 1977 Q. No. 1).

A. The theory known as "Positivism" commands a wide support, and has been adopted by a number of influential writers.

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The positivist view was in vague in the 18th century. The "positivists" hold that the rules of international law are in final analysis of the same character as "positive." Municipal law, i e. State law insamuch as they also issue from the will of the State. They believe that international law can, in logic, be reduced to a system of rules depending for their validity only on the facts that States have consented to them. ("Positive Law and International Law"—American Journal of International Law (1957) Vol. 51, pp. 691—733).

The concept of the will of States was first propounded by German philosopher Sir Hegal. According to positivism International law is a body of rules which has been consented to by the states and accepted as binding by way of voluntary restrictions or autolimitation.

Thus pursuant to their initial assumption, the positivists, regard International law as consisting of those rules which the various State-wills have accepted by a process of voluntary self-restriction, or as they have termed it "autolimitation". Without such manifestation of consent, International law would not be binding on the Society of States Zone, one of the positivists, indeed regarded international law as a branch of State law, as external public law and only for that reason binding on the State. The positivists concede that the difficulty in the application of their theory relates to customary international law. They admit that sometimes it is impossible to find an express consent in treaties.

The outstanding positivists has been the Italian jurist Anzilotti. According to Anzilotti, the binding force of International law can be traced back to one supreme, fundamental principle or norm, the principle that agreements between States are to be respected, or as the principle is better known, *pacta sunt servanda*. This norm *pacta sunt servanda* is an absolute postulate of the international legal system, and mainfests itself in one way or another in all the rules belonging to international law.

It spite of its many weaknesses, positivists theory has had one valuable influence on the science of International law. It has concentrated attention on the actual practice of States by emphasising perhaps, unduly, that only those rules which States do in fact observe can be rules of International Law.

And at the end the failure of positivism was due to the moral indifference of the positivism to human ends of power and their passive acceptance of the individualism of sovereignties.

CHAPTER II

History of International Law

Q. 12. Evaluate the contributions made by the Jews, the Greeks

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and the Romans to the development of International Law. (I.A.S. 1948 and 1954).

A. International Law as we find today is the product of the experience of civilised nations of the world and the continuous growth of many centuries. In this connection the contribution of Jews, Greeks, Hindus and Muslims deserves a special mention.

Jews.—The ancient Jews by reason of their religious ideology which prevented them from treating other nations as their equal had dealings only with few foreign nations. Their rules provided for the observation of treaties and respect for the ambassadors of friendly powers. But with every nation the Jews waged ruthless wars and no moral rule or law was strong enough to check them in their cruelty.

There are references to treaties between Egyptian Pharaohs and the neighbouring kings and also between Hebrew kings and their neighbours. The foreigners living in the Jewish territories, were governed by the same laws as the Jews themselves. "Love the stranger ; for ye were strangers in the land of Egypt." (Deuteronomy, Ch. X verse 19). With friendly nations, Jews had international relations. They faithfully observed treaties and considered diplomatic envoys as sacrosanct.

But, a reading of the Bible shows that on account of their monotheism the Jews did not recognize other nations who professed polytheism as their equals. They carried on ruthless battles throwing all cannons of warfare to wind.

Greeks.—The beginning in formulating rules of conduct for the States was made by the Greeks at a time when a number of a city States having common race, language, religion and customs sprang up and the need for some rules of guidance with regard to their mutual relations was keenly felt. There was a real community of interest among these city States and this was enough to bring into existence some form of International Law. Thus, it is clear from the study of ancient History that when most of the countries of the world were backward and were less civilized, the Greek civilization was in its advance stage and Greeks had achieved great advancement in different fields.

Greek philosophers conceived the idea of a 'higher law' or 'natural law'—the true universal rule of right or wrong. This natural law helped them in making rules to govern the States in their mutual dealing. The following will give an idea of the laternational Law of the Greeks :

(a) War could not be commenced without a previous declaration of war.

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(b) Prisoners of war could be made slaves ; they could be exchanged or let off on payment of *ransom.*

(c) the inhabitants of the captured city taking refuge in a temple could not be killed.

(d) Heralds, priests and holy seers in the Army of the enemy were inviolable.

(e) inter-State disputes could be referred to arbitration. Many treaties contained an arbitration clause.

(f) Treaties were to be entered and respected.

(g) Ambassadors enjoyed special privileges. They were ceremoniously received ; their persons were inviolable.

It is well known fact of history that a treaty of peace was conconcluded between Alexander's successors and Chandra Gupta Maurya of India ; ambassadors were exchanged between their courts.

Romans—The contribution of the Romans in the development of International Law was more significant. It was during the period when Rome was a City State and the Romans maintained relations with Foreign States that International Law came into existence. The Romans had twenty *fetiales* who were in charge of their foreign affairs. These *fetiales* were employed when war or peace was made, treaties were entered into and when there arose some inter-State disputes of any kind.

The *jus gentium* of the Romans which was originally a law applicable to foreigners coming to Rome in course of time by its association with *jus naturale* of the Greeks developed into a system of law governing international relations. The *jus naturale* served as a model to the Romans and it was referred to the matters where *jus qentium* was silent. Important feature of their system of International law were :—

(a) Wars were of two categories, *viz*, just wars and unjust wars. Just wars were those which were waged (1) for violation of Roman territory, (2) for violation of ambassadors, (3) for violation of treaties and, (4) for an unfriendly act *e. g.* help given to any enemy by a friendly State. These just wars were permitted only when the offending State failed to make amends for the wrong done on being asked to do so. Four *fetiales* were commissioned to go and demand reparation. In case reparation was refused one of the *fetiales* threw a lance from Roman frontiers to the offending territory and that meant a formal declaration of war.

(b) Although no regular rules existed about the manner of warfare, Romans had rule governing the close of warfare. Wars could be ended by (1) a treaty of friendship, (2) surrender, (3) conquest.

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In case of surrender, property and lives of the enemy surrendered stood saved, while on conquest the Romans were free to deal with property and lives in any manner they liked.

(c) Ambassadors enjoyed full protection.

(d) Treaties were of three kinds, *viz.* (1) Treaty of friendship, (2) Treaty of alliance, and (3) Treaty of hospitality. A treaty was capable of being terminated by notice. But so long as it remained in force, it was respected.

Roman jurispurdence evolved Laws concerning occupation of land, contracts and various parts of private rights of citizens. According to Brierly—

"The position of Roman law in Europe in 16th century has important bearing on the beginning of International Law".

Q. 13. Explain the view point of the Naturalists, the Positivists and the Grotians on International Law (I.A.S. 1948 and 1951).

Or

Explain the difference between the schools of Naturalists and Grotians. (I.A.S. 1960), P.C S. 1973.

What do you understand about the theories as "law of nature" ?

Or

"The Concept of the 'law of nature' exercised a signal influence on the International law"—Starke. Discuss.

A. During 17th and 18th century, three different schools of writers in International Law came into existence, *i e*, the Naturalists, the Positivists and Grotians.

Naturalists.—The Naturalists headed by Pufendorf maintained that International Law was but a part of natural law and that no positive International Law could be derived from treaties or customs. Because of their denial of the existence to International Law as a separate branch of law, the Naturalists are, also sometimes, called the Deniers of the law of Nations. They do not accept either customs or traditions as the guiding principles of International Law, and maintained that rules of International conduct were evolved out from natural law as evidenced in the application of reason to international relations

Criticism.—Following criticism has been made conception of Natural Law as to this thought :—

(1) In this period it was believed that there existed relation-

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ship in the universe. Besides being an exaggeration, the belief in this conception was not sustained by the practice of the States.

(2) According to Naturalists if there was a conflict in between positive and Natural Law, the later will prevail. It was a very revolutionary idea and could not be accepted.

The Positivists.—The Positivists, under the leadership of *Bynkershoek*, a Dutch Jurist did not consider natural law of any importance but regarded customary law based on treaties and customs to be positive International Law and of highest importance. This school maintained that the usages and customs embodied that collective reason of generation and nations and, therefore furnished the real source of International Law. Another great exponent of this school was *John Jacob Moser*, a German writer, who collected treaties and usages on the subject of the International Law. The third writer of the importance of this school was *George Friedrich de Martens* whose book '*Precis on droit desgens moderne del Europe*', was published in 1789 on the eve of the French Revolution and greatly influenced the political thought, of nations According to positivists, the binding force of International Law is founded on a Supreme principle or norm which is known as '*Pacta Sunt Servanda*'. But Positivists admit that their view fails to explain the basis of customary International Law. In there view, there is an implied consent in regard to customary rules of International Law.

Grotians.—The Grotian School took a middle course. This school recognises the distinction between natural law and customary or voluntary law of Nations and accepts the contribution of each to the development of modern International law.

Vattel, one of the great exponents of this School asserts that "the law of nations is originally no other than the law of nature applied to nations." Natural Law is thus necessarily a law ; all nations are bound to observe it. It cannot be changed or abrogated. But this apparently sweeping assertion is deprived of all meaning by this distinction which *Vattel* made between an internal law (law of conscience) and an external law (law of action). For all practical purposes, only the latter is significant. "Natural law is relegated to the unfathomable depths of the conscience of a State, whereas all real International law is held by *Vattel* to have derived from the will of the nations, their presumed consent only expressing itself is in treaties or customs."

Christian Wolff—Is also a leading Grotian. "The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States form a world State of above component member State, the so-called Civitas Gentium Maxima".

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The eighteenth century saw the victory of the Positivist Schools of International Law. The French Revolution brought with it new ideals of democracy and the growth of nationalism stimulated the growth of International law.

Q. 14. Assess the influence of Grotius on the history of International Law. What Grotian doctrines can be said to have left their mark on International Law (I.A.S. 1966).

Or

Estimate briefly the contribution of Grotius to the development of International Law. Do you agree with the view that Grotius is the founder and father of modern International Law.

Or

"International Law owes its existence as a systematized body of rules largely to the Dutch jurist Hugo Grotius whose work 'De Jure Belli Ac Pacis' became the foundation of all legal development"—Oppenheim. Examine this statement. (I.A.S. 1957).

Or

'Grotius appeared to posterity as the father of the law of Nature as well as father of the law of Natinos." (Oppenheim) Discuss. (I.A.S. 1959, 1966, 1972, 1974).

Or

'Although owes much to Gentilis. he is nevertheless the greater of the two and bears by night the title of father of the Law of Nations.' Discuss.

A. Grotius was born in Holland in 1583. At the age of fifteen, he took the degree of Doctor of Laws. He wrote two works on International law, the *de jure praedae* in 1604, and the *de jure, belli ac pacis* in 1625. The former of these, in which he supported the claim of the Dutch East India Company to the capture of prize from the portuguese, was never published by him, and was not discovered until 1864.

It was then found that a short work, which he published anonymously in 1609, the *mare liberum*, contending, in opposition to the claims of Portuguese, that the open sea could not be appropriated by any State, had been written as one of the chapters of the *de jure praedae.*

De jure belli ac pacis the famous work of Grotius of International Law was published before the Peace of Westphalia in 1625. It earned for its author abundant praise and an everlasting fame. In his search for the rules of International Law, Grotius made natural

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law the basis of his system. But in doing so he did not ignore what he termed a 'voluntary law' based on consent either express in the form of treaties or implied in the form of customs and usages. o him natural law is "the dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature is either morally wrong or morally necessary and accordingly forbidden or commanded by God, the author of nature. Grotius tested the validily of his rules on the touchstone provided by *Law of Nature*. The voluntary law was thus subordinated to the law of nature. In the case of conflict between the natural law and voluntary law the former was to prevail. His next work *temperamenta belli* is also a lasting contribution to the development of International Law.

His contribution to International Law.—Some of the notable contributions of Grotius to International Law are as follows :—

(1) **Hugo Grotius** gave classical expression to the new foundations of natural law as well as to the principles of modern international law in his celebrated work *De Jure Belli ac Pacis* which became very famous because at that time when it was published circumstances were such that it prevailed over. There were a number of independent States in Europe and these States had common interest and aims which knitted them into a community of States. Since a law of Nations was very necessary, so many principles of law were already more or less recognised and appeared again among the doctrine of Grotius, supplied a legal basis to most of those international relations which were at that time considered as lacking such a basis, the book of Grotius obtained such a wide influence that he is correctly styled the 'Father of Law of Nations' (1623 1625).

(2) According to Grotius, the property peculiar to man is his desire for society, for a life spent tranquilly in common with fellowmen and in correspondence with the character of his intellect. From the nature of human intellect which desires a peaceful society principles of natural laws are derived. They are independent of divine command. "Natural law is so immutable that it cannot be changed by God himself." He further says that it is the nature of man endowed with 'goodness, altruism and morality' which in the final analysis is the basis of International Law.

(3) Grotius built the system of International Law on his principles of Natural Law. The most fundamental of his principles is *Pacta Sunt Servanda* the respect of promises given and treaties signed.

(4) Grotius also conceived of the totality of relations between States as governed by law. He distinguished just wars from unjust ones and rejected the claim to absolute right of States to make war.

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(5) The essential identity of States and individuals has been recognised by Grotius, not because the States are like individuals but because the States are composed of human beings.

(6) He gave orientation to the doctrine of Qualified Neutrality. Neutrality was said to be qualified when a State while remaining neutral on the whole gave some assistance directly to either belligerent carrying on a just war in compliance with the terms of an existing treaty.

(7) Having been shocked by the horrors and atrocities of the Thirty Years War, Grotius advocated the principle of intervention on humanitarian grounds which should guarantee the fundamental rights and freedoms of the individual. The doctrine has also been embodied in the United Nations Charter.

(8) He abhorred war and disapproved it as a means of settling the dispute. He favoured negotiation and arbitration and other peaceful means for the settlement of disputes between nations.

(9) He was also instrumental in the propagation of progressive ideals in the sphere of international relations. Thus he liked extradition of criminals so that crimes in all nations may be checked and suppressed by international co-operation.

(10) He also developed the theory of diplomatic immunities and advocated freedom of navigation on international rivers He also championed the principle of free trade for economic freedom. Likewise he advocated freedom of seas while allowing the ownership of gulfs and marginal waters.

(11) In the case of blockade he was in favour of conflicting all severities against those who were instrumental in making supplies into a part that was blockaded.

(12) The question as to what goods were contraband of war was also answered by Grotius. He did not use term 'contraband' but he enquired into question as to what articles were destined for the enemy in the war and were such as to entitle belligerents to capture them on their way by the enemy. He made a three-fold classification of all the articles. In the first place, he puts those articles which are by their very nature useful in warfare, *e. g.*, arms and ammunition. In the second class, came those articles which are of no use in war, *e. g.*, fashion and fancy goods, etc. The third class contained articles. which were useful both in war and out of war, *e. g.*, money, provisions, ships and other fittings.

(13) Much of the credit for secularising the concept of natural law goes to Grotius. He expounded the secularised concept of law of nature. Thus according to him natural law was the 'dictate of right of reason.'

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It is, thus, clear that Grotius touched almost every important aspect of International Law and his contributions to the rise and development of International Law are very significant.

"The importance of Grotius lies in the fact that in reducing the medieval system to its final and most perfect form, he laid at the same time the foundations of the modern law."—*Dr. H. A. Smith* : *The Crisis in the Law of Nations, p. 9.*

Starke while recognising the contribution of Grotius hold the view that the International law first assumed systematic shape as the result of Grotius 'book'.

Weakness of Grotius.—It should also be noted that there are certain glaring weaknesses in his system. Writing about his principal work, *Vaughan* observes : "That learned Medley *De jure ac Belli ac Pacis* which, however, valuable as a first attempt to lay the foundation of International Law and even here it is vitiated by a perpetual confusion between the fact and right—is for all speculative purposes a test of sophistries and contradictions." His *De jure Belli ac Pacis* is somewhat hasty and superficial and absurd in laborious and elaborate distinction between diverse kind of justice and various categories of law but it is not clear what is the object of these distinctions. His purpose was the humanization of the conduct of war. But that purpose seems to be vitiated by his fervent advocacy of war without any restraint. As Lauterpacht observes, this is not so because of the fact that Grotius elaborates and defends the lawfulness of war with much zeal and learning but what is more difficult to understand is that he seems to elevate that 'lack of restraint' relating to war, such as, even barbarous nations should be ashamed of, to the dignity of a rule of the law of nations. The law of nations gives the right to kill or injure all those who are in the terrritory of enemy. This obviously militates against the avowed object of the treatise. His treatise has been condemned, as a "servile and reactionary instrument" to justify the existence of the established authority. Thus he justified slavery being in consonance with the *Law of Nature*. His method also has been condemned as defective. It is said that neither is he a pure Positivist, nor a Naturalist nor a Grotian, who has accomplished a workable synthesis of natural law and State practice.

Grotius : The father of International Law —However, in view of his lasting contributions to the growth and development of the International Law, Oppenheim styles Grotius as the "Father of the Law of nations". This view unfourtunately has not the merit of universal acceptance. According to *Holland*, "the first step towards making International Law what it is, was taken not by Grotius but by Gentili, an Italian jurist". *Brierly* has correctly analysed the position thus, "Few books have won so great a repu-

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tation as the *De jure Belli ac Pacis*, but to regard its author as the "founder of International Law is to exaggerate its originality and to do less than justice to the writers who preceded him; neither Grotius, nor any other single writer can properly be said to have founded the system. The reputation for the book was not wholly due to its merits though these are great; it was partly due to the time and circumstances of its publication. When he wrote in 1625, Grotius was already so eminent that anything from his pen would have attracted attention."

Nevertheless, it would not be forgotten that *De jure Belli ac Pacis* is the first comprehensive and systematic treatise on International Law. He gave a new orientation to the Law of Nature so that it proved to be a solid edifice on which the subsequent superstructure of the Law of Nations was built up. Whatever may have been the changing fortunes of the doctrine of the Law of Nature, the fact remains that for more than two hundred years after Grotius, Jurists, philosophers and theologians firmly believed in it. There is in *De jure Belli ac Pacis* a great deal of matter which is not and never has been within the proper sphere of international law, but it contains all the international law that existed in 1625. "Despite short-comings of method and defect of substance, his work is above the place of a more episode". The controversy as to who is the 'father of the law of nations' is according to Lauterpacht, in essence one of words. No one denies to Grotius the representative quality of pre-eminence. Dr. Lauterpacht in his brilliant article on "The Grotian Tradition in international law" in British : Year Book of International Law, 1946 concludes : *De jure Belli ac Pacis* is pre-eminently a treatise which must be judged not by reference to its method, but by its influence on the doctrine and on the practice of the law of nations. It satisfied the craving in the jurists and the layman alike for a moral content in the law. In stressing and on the whole maintaining the distinction between law and morality it indicated the place of the law of nations in legal science. Last but not the least it became identified with the idea of progress in International Law.'

Again according to judge Lauterpacht, there were number of reasons and factors which in a sense, are external to substance of Grotiu's teaching and which had a share in securing its contemporaneous success and its place in the succeeding centuries.

Q. 15. Assess the contribution of the following in the development of International Law—

(a) Zouche, (b) Pufendorf, (c) Bynkershoek and (d) Vattel.

(I. A. S. 1959)

A. (a) Zouche —Richard Zouche (1590—1660), Professor of

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Civil Law in Oxford University and judge of the Court of Admiralty, was a prolific writer on legal subjects ; among his works being one International law, the *just et judicium faciale, sine just inter genes* published in 1650. This has been called by Hall as the first manual of international law, for it discusses briefly but clearly almost every part of the subject. Without abandoning the law of nature as one of the bases of international law, Zouche preferred to deduce the law from the precedents of State practice, and he is sometimes regarded as precursor of the positive school of international lawyers, who regard the practice of States as the only source of law. Zouche introduced one important improvement of method, for he was the first writer to make a clear division between the law of peace and the law of war, and to make the former more prominent of the two.

(b) Pufendorf.—Samual Pufendorf (1632-94), Professor at Heidelberg, and afterwards at Lund in Sweden, published his *De jure neturale at gentium* in 1672, and may be regarded as the founder of the so-called 'naturalist' school of writers. He denied any binding force to the practice of the nations and based his system wholly on natural law, but on a natural law in the new and debased form of a law supposed to be binding upon men in an imaginary 'state of nature'. There are traces of this conception in Grotius, but it had little influence on his system ; for his law of nature was a law of reason directing men at all times, whether organized in political societies or not, and only in this sense, has the conception of any permanent validity.

(c) Bynkershoek.—Cornelius Van Bynkershoek (1673-1743), a Dutch judge, was the author of works on special topics of international law, of which the most important was the *Questiones juris publici* published in 1737. Bynkershoek had an intimate knowledge of questions of maritime and commercial practice, and he has an important place in the development of that side of international law. The fixing of three-miles limit to maritime-belt is tributed to him.

Bynkershoek belonged to the 'positive' school of writers, basing the law on custom, but holding also that custom must be explained and controlled by reason, which he refers to as *ratio juris gentium magistra*. He held also that the recent practice of States was more valuable evidence of custom than the illustrations from ancient history with which his predecessors had generally adorned their works since, 'as customs change, so the law of nations changes' ; but he attached more weight to the stipulations of particular treaties as evidence of the existence of custom than modern practice would allow.

(d) Vattel.—Emerich de Vattel (1714-69), whose work *Le Droit des gens* was published in 1758, was a Swiss who served in the diplomatic service of Saxony. He intended his work as a manual

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for men of affairs, and was a populariser of other men's ideas rather than an original thinker ; yet he probably exercised a greater permanent influence than any other writer on international law, and his work is still sometimes cited as an authority in the international controversies. He accepted the doctrine of the *state of nature* and asserted that men in the state of nature lived under the nature and after forming civil society came under the obligation of observing the social laws ; they continued under both sets of laws, natural and social. This system of international law began with a recognition of the State as a corporate person having understanding and will of its own and susceptible at once of the obligations and rights. The doctrine of equality of States was introduced by him into the theory of international law.

According to Vattel, the law of nations in its origin is merely the law of nature applied to nations, it is not subject to change, and treaties or customs contrary to it are unlawful. But other elements have been admitted into the law ; for, says Vattel, natural law itself established the freedom and independence of every State, and therefore each is the sole judge of its own actions and accountable for its observance of natural law only to its conscience. Other States may *request* it to reform its conduct, but what they may actually *demand* from it is something much less. This lower standard of *enforcible* duties, Vattel calls, the voluntary law of nations, because it is to be presumed that States have agreed to it in contrast with the other element of natural or, as he calls it, *necessary* law. 'Let each sovereign make the *necessary* law the constant rule of his conduct ; he must allow others to take advantage of the *voluntary law of nations*."

The result of division in Vattel's system were *unfortunate*. For instance, Vattel tells us that by the *necessary* law a State has a duty to maintain freedom of commerce, because this is for the advantage of the human race ; but by the *voluntary* law it may impose such restrictions upon it as suits its convenience, for its duties to itself are more important than its duties to others. By *necessary* law, again, there are only three lawful causes of war, self-defence, redress of injury, and punishment of offences ; but by *voluntary* law we must always assume that each side has a lawful cause for going to war, for princes may have had wise and just reason for acting thus and that is sufficient at the tribunal of the voluntary law of nations.

In some respects, however, Vattel's system was an advance on those of his predecessors. He rejected the patrimonial theory of the nature of government which Grotius had held : "this pretended right of ownership attributed to princes is a chimera begotten of an abuse of the laws relating to the inheritance of individuals. The State is not, and cannot be, a patrimony since a patrimony

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exists for the good of the owner, whereas the prince is appointed only for the good of State'. He recognized in certain circumstances the right of a nation to separate itself from the rest, a doctrine which partly explains his great popularity in the United States, where a copy of the work was first received in 1755. *Professor De Lapradelle* has justly written of him that :

"Before the great events of 1776 and 1789 occurred, he had written an international law, based on the principles of public law which two Revolutions, the American and the French were to make effective.....Vattel's *Law of Nations* is International Law on the principle of 1789.....the projection upon the plane of the law of nations of the great principles of legal individualism. That is what makes Vattel's work important what accounts for his success, characterizes his influence, and eventually, likewise, measures shortcomings. Grotius had written the international law of absolutism. Vattel has written the international law of political liberty."

"All the same, the survival of Vattel's influence into an age when the 'principles of legal individualism' are no longer adequate to international needs, if they ever were, has been a disaster for international law.....It is true that in Vattel's own days the interdependence of State was less conspicuous in international practice than it is today ; and this partly excuses the onesidedness of his system. Nonetheless by cutting the frail moorings which bound international law to any sound principle of obligation he did it an injury which has not yet been repaired'—*Brierly*.

Q. 16. "The system of International Law, as we know it, has its beginning in about the middle of sixteenth century. It comes into full existence almost as bound in 1625, and it has its classical period from that date to the latter part of the eighteenth century" (Pound). Trace in the light of the above statement the history of International Law from the earliest times to the eighteenth century.

A. Development of International Law before 15th Century.— The modern system of International Law is a product, roughly speaking, of only the last four hundred years. It grew to some extent of the usages and practices of the modern European States in their intercourse and communications, while it still bears witness to the influence of writers and jurists of the sixteenth, seventeenth and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concepts. such as, national and territorial sovereignty and the perfect equality and independence of States, that owe their force to political theories underlying the modern European State System.

But any historical account of the system must begin with

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earliest times. for even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by those communities in their mutual relations. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example, in ancient Egypt.

We find, for example in the period of Greek City States, small but independent of one another, evidence of an embryonic form of International Law which one authority—*Professor Vinogradoff* has aptly described as "intermunicipal." This "intermunicipal" law was composed of customary rules which had crystallized into law from long-standing usages followed by these City States, such as, for instance, the rules as to the inviolability of heralds in battle, the need for a prior declaration of war, and the enslavement of prisoners of war. Underlying the rules there were however, deep religious influences, characteristic of an era in which the distinctions between law, morality and religion were not sharply drawn.

In the period of Rome's dominance of the ancient world, there also emerged rules governing the relations between Rome and the various nations of peoples with which it had contact. One significant aspect of these rules was their legal character, thus contrasting with the religious nature of the customary rules observed by the Greek City States. But, Romes's main contributions to the development of International Law was less through rules than through indirect influence of Roman Law generally, inasmuch as when the study of Roman Law was revived at a later stage in Europe, it provided analogies and principles capable of ready adaptation to the regulations of relations between modern States.

Actually, the total direct contribution of the Greeks and Romans to the development of International Law was relatively meagre. Conditions favourable to the growth of a law of nation did not really come into being until the fifteenth century, when they grew up in Eurooe a number of independent civilized States. In the later period of Roman history, with the authority of the Roman Empire extending over the whole civilized world, there were no independent States in a sense, and therefore a law of nations was not called for. During the early medieval era, there were two matters particularly which militated against the evolution of a system of International Law, (a) the temporal and spiritual unity of the greater part of Europe under the Holy Roman Empire ; and (b) feudal structure of Western Europe hinging on a hierachy of authority which not only clogged the emergence of independent States but also prevented the powers of the time from acquiring the unitary character and authority of modern sovereign States.

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Fifteenth and Sixteenth centuries.—Profound alterations occurred in the fifteenth and sixteenth centuries. The discovery of the New World, the Renaissance of learning, and the Reformation as a religious revolution disrupted the political and spiritual unity of Europe, and shook the foundations of medieval Christendom. Theories were evolved to meet the new conditions ; intellectually, the secular conceptions of a modern sovereign State and of a modern independent Sovereign found expression in the works of Bodin (1520-1596), a Frenchman, Machiavelli (1469-1527), an Italian and later in the seventeenth century, Hobbes (1588-1679), an Englishman.

With the growth of a number of independent States there was initiated, as in early Greece, the process of formation of customary rules of International Law from the usages and practices followed by such State in their mutual relations. So, in Italy with its multitude of small independent States, maintaining diplomatic relations with each other and with the outside world, there developed a number of customary rules relating to diplomatic envoys, for example their appointment, reception and inviolability.

An important fact also was that by the fifteenth and sixteenth centuries jurists had begun to take into account the evolution of a community of independent sovereign States and to think and wrtie about different problems of the law of nations, realising the necessity for some body of rules to regulate certain aspects of the relations between such States. Where there were no established customary rules, the jurists were obliged to devise and fashion working principles by reasoning or analogy. They also studied and worked on the theological concept of law of nature which exercised a profound influence on the development of International Law for centuries. Among the early writers who made important contributions to the infant science of the law of nations were Vittoria (1480-1546), who was Professor of Theology in the University of Salamanca ; Belli (1502-1575), an Italian ; Brunns (1491-1563), a German ; Ferdando Vasquezde Menchaca (1512-1569), a Spaniard ; Ayala (1548-1584), a jurist of Spanish extraction ; Suarez (1548-1617), a great Spanish Jesuit ; and Gentilis (1552-1608), an Italian who became Professor of Civil Law at Oxford and who is frequently regarded as the founder of a systematic law of nations. The writings of these early jurists reveal significantly that one major occupation of sixteenth century International Law was the law of warfare between States, and in this connection it may be noted that by the fifteenth century the European Powers had begun to maintain, standing armies a practice which naturally caused uniform usages and practices of war to evolve.

The Year 1625.—In 1625, the work of Grotius—*De Jure Belli ac Pacis* was published. On account of this treatise, Grotius has

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sometimes been described as the "father of the law of nations." Athough it is maintained by some that such a description is incorrect on the grounds that his debt to the writings of Gentilis is all too evident and that in point of time he followed writers such as Belli, Ayala and others mentioned above.

Judge Lauterpacht adds that the controversy as to who was the "founder"' of International Law is in essence "one of words, for no one denies to Grotius the representative quality of pre-eminence".

In this book, Grotius dealt repeatedly with the actual customs followed by the State of his day. At the same time, Grotius was a theorist who espoused certain doctrines. One central docrine in his treatise was the acceptance of the "law of nature" as an independent source of rules of law of nations, apart from custom and treatise. The Grotian "law of nature" was to some extent a secularised version, being founded primarily on the dictates of reason, on the rational nature of men as social buman beings, and in that form it was to become a potent source of inspiration to latter jurists. His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being. International law was binding because it was in fact natural law applied in special circumstances.

Seventeenth and eighteenth Centuries.—The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern State system in Europe, a process greatly influenced by the Treaty of Westphalia of 1648 marking the end of the Thirty Years' War, and by the development from usage and practice of a substantial body of new customary rules. Moreover the science of International Law was further enriched by the writings and studies of a number of great jurists. Side by side there proceeded naturally a kind of action and reaction between the customary rules and the works of those great writers. The influence of these great jurists on the development of International Law was considerable, as can be seen from their frequent citation by national courts during the nineteenth century and even up to the present time.

The most outstanding writers of the seventeenth and eighteenth centuries following the appearance of Grotius' treaties were Zouche (1590-1660), Professor of Civil Law at Oxford and an Admiralty Judge, Pufendorf (1632-1694), Professor at the University of Heildelberg, Bynkershoek (1673-1743), a Dutch jurist, Wolff (1679-1767) a German jurist and philosopher and Vattel (1674-1767), a Swiss jurist and diplomat, who perhaps of these five men proved to have the greatest influence. In the eighteenth century, there was a growing tendency among jurists to seek the rules of International

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Law only in custom and treaties, and to relegate to a minor position the "law of nature" or reasons, as a source of principles. There were, however, jurists who at the same time clung to the traditions of the "law of nature", and they were divided into two groups :— (a) "naturalists", such as Pufendorf, who derived International Law entirely from that concept ; and (b) "Grotius", who gave weight both to custom and treatise on the one hand, and to the "law of nature", on the other. As contrasted with the "naturalists" and "Grotius", writers such as Bynkershoek, who laid almost exclusive emphasis on custom and treaties, were called "positivists" althoug the mere perusal of Bynkershoek's works shows that time and again he necessarily had recourse to reason to find the rules of the subject.

Q. 17. Give a brief account of the development of Intenational Law during the nineteenth and twentieth centuries. Examine briefly the contribution of various agencies towards its development.

A. The Development of International Law in 19th and 20th Centuries is influenced by many factors. The relations of the State and their mutual contacts had been greatly increased during the said period. We may discuss it in following headings :—

Nineteenth century.—In the nineteenth century International Law further expanded. This was due to a number of factors which fall more properly within the scope of historical studies, for instance, the further rise of powerful new States both within and outside Europe, the expansion of European Civilization overseas, the modernisation of world transport, the greater destructiveness of modern warfare, and the influence of new inventions. There was a remarkable development during this century in the law of war and neutrality, and the great increase in adjudications by international arbitral tribunals following *Albama Claims Award of 1872* provided as important new source of rules and principles. Besides, States commenced to acquire the habit of negotiating general treaties in order to regulate the affairs of mutual concern. Nor was the nineteenth century without its great writers on International Law. The works of jurists belonging to a number of different nations contributed significantly to the scientific treatment of the subject ; among them were Kent (American). Wheaton (American), De Martens (Russian), Kluber (German), Philimore (British), Calvo (Argentinian), Fiore (Italian), Pradier Fodex (French), Bluntschli (German) and Hall (British). The general tendency of these writers was to concentrate on existing practice, and to discard the concept of the law of nature", although not abandoning recourse to reason and justice, where in the absence of custom or treaty rules, they were called upon to speculate as what should be the law.

In the nineteenth century, the positivists were in vogue. They

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were based on actual practice of States. It was the period of decline of the natural law. According to positivists, people will be bound to obey the law if it was created by the act of Legislature. They called this law, 'Law positivism or positive law' i e. the law in fact. The Positivist school retained its predominance in the nineteenth century. In 1839 *Manning* published his 'Commentaries on the Law of Nation', *Phillimore's* famous *'Commentaries of International Law'* were published in 1854, Hall's book on International Law was published in 1880, Walkar published his *'Science of International Law'* in 1893. In United States too several important books were published. Henry Wheaton's, 'Element of International Law appeared in 1836.

Twentieth Century.—The two great writers who brought out their works on International Law in the beginning of twentieth century were *Westlake* and *Oppenheim.* 20th century saw the revival of natural law. Positivism was subject to several criticism. Once again faith in natural law was affirmed. But there was significant change in the concept of natural law in 20th century. For example—Stambler admitted that natural law could be adopted to the changing times and circumstances although its fundamental principle remained unchangeable. He therefore propounded the theory of "Natural law" with a variable content". Following is a brief account of the different agencies that led to the growth and development of International Law.

Hague Conferences.—The peace conferences at the Hague marked the beginning of real effort to make a clarification and enunciation of the rules binding on States in international relations by common consent. At the First Hague Conference in 1899 a Code of rules with respect to warfare on land was adopted. The Second Hague Conference of 1907 concerned itself more with the rules relating to warfare than with other subjects. Conventions dealing with bombardment, the lying of contact mines, rights and duties of neutrals in naval warfare, conversion of merchant ships into warships, maritime warfare and other allied subjects were adopted.

The Covenant of the League of Nations.—As a result of the Versailles Treaty, concluded after the First World War on June 28, 1919, between the victorious powers of First World War and Germany, the League of Nations was established under a covenant of twenty-six articles. The covenant of the League of Nations may be regarded as representing the keen desire of world tired of war for an everlasting peace.

Locarno Pact (1925)—This came as supplementing the provisions of the covenant of the League of Nations. The pact contained a Treaty of Mutual Guarantee concluded between Great Britain, Belgium, France, Germany and Italy.

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Kellogg Briand or Paris Pact (1928)—The treaty for the renunciation of war popularly known as the *Kellogg Briand Pact* condemned recourse to war for the settlement of international disputes and made a declaration of the renunciation of war as an instrument of national policy of States in their relations with one another.

Geneva Convention (1929).—At this conference elaborate conventions on the Treatment of Prisoners of War and amelioration of the conditions of the wounded and sick in the armies in the field were adopted. The convention on Treatment of Prisoners of War aimed at protecting prisoners from abuses to which they were subjected during the First World War.

Codification.—The League of Nations took up the question of the codification of International Law and a committee of experts was also appointed for that purpose. Elaborate Codes of international Law came into existence.

Second World War.—The outbreak of the Second World War was a rude awakening to the world lulled into sleep under the protection of the *Kellogg Briand Pact* and the Legue of Nations. International Law appeared to have vanished. The Dumbarton Oaks Conference brought out proposals for the establishment of a World Organisation. Then followed the Conference at San Francisco which adopted the Charter of the United Nations on June 26, 1945 The establishment of the United Nations with the International Court of Justice marks the supremacy of International Law. The Charter makes it obligatory on the General Assembly to initiate studies and make recommendations for the purpose of promoting international co-operation in political field and of encouraging the progressive development of International Law and its codification. The International Court of Justice decides disputes in accordance with International Law. The United Nations adopted various treaties and conventions leading to the growth and development of International Law, such as the Universal Declaration of Human Rights (1948). the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) add many conventions on genocide. The United Nations has taken concrete steps to codify International Law and stop race for increased armaments, though in the latter there has been little achievement of a positive nature.

Q. 18. "Since this universal cataclysm (World War I) International Law has become a byword. Indeed it has popularly been regarded as a myth since the Second World War." (Wm. Seagle.) Comment.

A. Implication of the Statement.—During the First World

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War (1914-1919) flagrant violations of international rules were made. The laws of war were thrown into wind by the belligerents. International Law was deliberately violated during the first World War and humanity lost its faith in the binding nature of the rules of International Law. The long standing permanent neutrality of Belgium suffered a ruthless violaion at the hands of Germany. The rules of warfare on land and sea enunciated by the Hague Conference were reduced to mere mockery. All immunities and prohibitions guaranteed by international Law vanished in the whirlwind of horrible warfare, the like which the world has not so far seen. During the course of First World War German Submarines sank belligerent merchantships without warning, bombed unfortified town and resorted to use of poison gas. These acts isolated all existing laws of war. German necessities of war regarded nothing in international Law to prevent the use of improper means of warfare.

Effect of World War II.

The outbreak of the Second World War (1939-1945) was a rude awakening to a world lulled into sleep under the protection of the Kellogg—Briand Pact and the League of Nations. International Law appeared to have again vanished. The Nazi tyranny acknowledged no law and the violations of the First World War were repeated with greater force. This period witnessed an utter disregard of the rules of warfare. There was a complete violation of the rules of aerial warfare by the indiscriminate bombing of Warsaw and other Polish cities in 1939 followed by the devastating bombardment of the neutral city of Rotterdam on May 14, 1940. The terrible bombardment of London and other English cities by German aircrafts. which brought about untold misery and havoc, only showed the depth to which a belligerent could fall in order to win the war. The British and American airforces in their turn also carried out an equally indiscriminate and ruthless bombing to German cities. The whole war was fought without any regard to the rules of warfare. Non-combatants were mercilessly killed and buildings devoted to public worship, art, and religion, and historical monuments were bombarded. To cap all these atrocities came the use of atomic bombs by America against the Japanese cities of Hiroshima and Nagasaki in 1945.

On the basis of the violation of International Law during the World Wars, Wm. Seagle made the above observation. Whatever respect for International rules was left after World War 1, disappeared after the Second World War. The International Law appeared to have vanished.

Comments.—The observation contains a grain of truth which cannot be denied but at the same time it can not also be denied

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that it does not give an unbiased picture of International Law after these two wars. It is no doubt true that during these wars international Law was strained to a breaking-point but it never creased to exist or, in other words, it never became a myth. The violations of International Law committed during the First World War did not retard the progress of the development of International Law. At the conclusion of the War, the League of Nations was established to ensure peace which was considered as an object of collective international effort. Thus the League of Nations was a direct outcome of it. The same is true about the Second World War. The U N O. and various international agencies are busy not only in maintaining International Law and order but also in expanding the contents and bounds of International Law.

In this connection J.G. Starke's observation is of a great importance. He says, "Breaches of International Law resulting in wars of aggression naturally receive a great deal of adverse attention. and from them the public incorrectly deduces the complete break down of International Law. The answer to this criticism is that even in war-time there is no absolute break down of International Law, as many rules affecting relations of belligerents *inter se* or with neutrals are of vital importance and for the most part are strictly observed. Another consideration is worth mentioning, 'Aggressor States repeatedly justify their violations of peace by invoking rules of International Law in their favour."

"It is impossible to argue further that in Municipal law (that is, State law), breaches, disturbances and crimes take place, but no one denies the existence of law to which all citizens are subject. Similarly, the recurrence of war between States does not necessarily involve the conclusion that International Law is non-existent."

Q. 19. Point out to the new trends in International Law. Has International Law a bright future ?

Or

"The common views that the International Law must be created solely by States is, therefore, not valid today–nor indeed has it ever been." Discuss.

A. New trends in International Law.—In spite of all the hurdles in the way, International Law is making tremendous headway. It is gaining not only in its bulk but also in its obligatory character. Certain new tendencies are quite perceptible in International Law. These new developments are very succinctly and lucidly summed up by Judge M Alvarez. It is quite useful to quote him in *extenso*. He observes :

"Formerly the rules of law were elaborated slowly, in accor-

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dance with well-established conventions or customs, or these rules were evolved, again as a slow process, by jurists. Today, because of the social upheaval which we have just traversed, because of the new dynamism in the life of peoples, because of the new international organization and the institutions and organs which the organization has created, and finally because of the aspirations of peoples and the exigencies of the modern life, the elaboration of such new rules is rapid and sometimes even sudden ; this elboration is effected by means which are different from those of former times and in this process the factors which have just been mentioned exert their influence "

"The common view that International law must be created solely by States is, therefore, not valid today—nor indeed has it ever been."

"In truth, alongside of conventional law there is customary law and above all the doctrines of jurists, who not only have the opportunity of establishing custom, but have formulated rules which have been respected by States."

"In future, it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look, more than to any one, for the creation of the new International law." In re *Competence of the General Assembly for the Admission of a State to the United Nations*, *I. C. J. Reports.* (1950) pp 4, 34.

Future of International Law.—The last half of this century witnessed a greater impetus to the development of International Law than at any previous stage of its history. This is a natural result of the growing inter-dependence of States, and of the vastly increased intercourse between them due to all kinds of inventions that overcame the difficulties of time, space, and intellectual communication. New rules had to be found or devised to meet innumerable situation. Whereas previously the international society of States could rely on the relatively slow process of custom for formation of the rules of International law, modern exigencies called for a speedier method of law-making. As a result, there came into being the great number of multilateral treaties of the last fifty years laying down rules to be observed by the majority of States "law-making treaties" or "international legislation", as they have been called. Apart from these "law-making treaties" there was a remarkable development in the use of arbitration to settle international disputes, and at the same time Permanent Court of International Justice came by its decisions to make an important contribution to the growth of International law. The mantle of the Permanent Court of International Justice has now descended upon its successor, the International Court of Justice. Nor should

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there be forgotten the work of codifying and progressively developing International Law at present being sponsored by the United Nations with the expert aid of a body known as the International Law Commission created in 1947.

International law like other laws can be effective only if it is flexible and capable of adopting itself according to the needs of the time. The chief aim and object of international law is to establish the rule of law in international field and to ensure the maintenance of international peace and security. It is possible only when it adopts itself to the changing times and circumstances.

If the present tendencies in international sphere are indication of the future, the international system will reach its perfection at no distant time. It is true that in some quarters there is a tendency to disparage International Law, even to the extent of questioning its existence and value But this tendency is now being given up. The attitude of the States towards international law at present is such as may lead to hope that the main defects generally pointed out will disappear. A careful scrutiny of the international events which have occurred after the Second World War will reveal that there is a growing tendency on the part of States to refer their difficulties to the United Nations and its organs to respect rule of law, and to feel persuaded by the recommendations of the United Nations and its organs. This tendency is expressive of their faith in the law and the potency of the United Nations. The future of International Law appears to be bright though the possibility of occasional setbacks cannot be ruled out.

CHAPTER III

SOURCES OF INTERNATIONAL LAW

Q 20. What do you understand by the 'Sources of International Law' ? P.C.S. 1971.

A. The term 'Sources of International Law' has been used in different senses by the writers on International Law. According to *Fenwick* : (1) Some writers like *Oppenhiem* interpret the term to include the causes of International Law. (2) Other writers on the other hand regard certain historical facts, long established usages and small treaties as sources of International Law. (3) There is also a third group of writers who interpret it as the evidence "which bear witness to the existence of certain rules of official documents which indicates the recognition by nations of an obligation to do or not to do a thing."

According to *Briggs*, "The word 'source' is ambiguous and the meaning assigned to it by various writers is often coloured by their

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doctrinal pre-dispositions as to the basis of legal obligation in international Law.....For reasons of clarity and precision, it seems preferable to employ the term 'sources of International Law' in a formal sense as indicating the methods or procedures by which International Law is created. Thus, when treaties are refer ed to as one of the sources of International Law, the reference should be regarded as indicating the treaty-making method ; the substantive content of the treaty in International Law. (for the parties), or sometimes 'evidence' of International Law"—*Briggs* : *The Law of Nations* p. 44.

Formal and Material Sources—Distinction.—A distinction is made between "formal" and "material" sources of International Law. The "formal sources" are those from which a law derives its authority or sanction. The "material sources" are those from which the law derives its contents or subject-matter. It is the "material sources" with which we are at present concerned.

According to *Starke*, "The material 'sources' (The term 'sources' has been placed in inverted commas in order to make the fact that, although frequently used as above, it is liable to misconstructions of International Law) may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation. According to him, "The material sources of International Law may be defined as the actual material from which an international lawyer determines the rule applicable to given situation. These material sources or sources in general have been laid down in Art. 38 of the Statute of International Court of Justice. They are as follows :

(a) International Conventions, whether general or particular establishing rules expressly recognised by the contesting States.

(b) International Custom, as evidence of a general practice accepted as law.

(c) The general principles of law recognised by civilized nations.

(d) Judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Q. 21. Assess the importance of the following as sources of International Law.

(a) Customs (I.A S.) 1961, 63, 73, 78, P.C.S. 1980).

(b) Treaties, (I.A.S. 1959, P C S. 1970).

(c) Decision of Courts and Tribunal, (I A S. 1974).

(d) Writings of jurists and commentators.

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(e) The general principles of law recognised by civilized nations. (I.A.S. 1964, 66 & 72)

(f) Resolutions and Declarations of General Assembly of the U. N.

Show the comparative value of the above-mentioned sources of International Law.

A. (a) Customs and Usages.—Of all the various sources custom has played an important part in building up the system of International Law. Customary law was undoubtedly, until recent times, the chief source of International Law. Because it is only in the modern period that the importance of customs has suffered a set back. However, even it is regarded as one of the important sources of International Law. Customary rules of International Law are the rules which have been developed in a long process of historical development. A customary rule of International Law may be defined as a rule which the States have since long been recognizing as right rule of conduct. Customary rules have the full force of law. Custom is different from usage which means a habitual practice. A rule based on usage has no force of law. Usages may ripen into customs. There may be conflicting usages on a particular matter but there can be no conflict in case of custom. This distinction is to be cleary borne in mind in dealing with the custom as a source of law. It is the weight of the materials that will go to decide the question whether the usage has received full legal attestation and whether a customary obligatory rule has come into existence. [*West Rand Central Mining Co.* v. *The King*, (1905) 2 K. B. 391 at p. 497].

An important test to determine the question whether a usage has crystallized into custom is furnished by the general attitude of the society of the States. If the States generally acknowledge that a particular rule of conduct is binding on them the transition from usage into custom may be regarded to be complete. In order that a rule may be held to be a binding customary law, it must be proved by satisfactory evidence that the particular rule is of such a nature, and has been so widely and generally accepted that it can hardly be supposed that any civilized State would repudiate it This test of general recognition has also been accepted by the Statute of International Court of Justice which in Article 38 provides for the application of international customs as evidence of a general practice accepted as Law." In *Rex* v. *Keyn*, (1876) 2 Ex. D 62, it was said "whether a particular usage has or has not been agreed must be a matter of evidence." But it is not necessary that the usage precede a custom. It is also not necessary that a usage must always become a custom. In certain cases usage may become custom and in certain cases it is not so As usages have

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a tendency to become custom, the question arises at what time does a usage turn into a custom ? This question is one of fact, not of theory.

In the *Asylum case* (1950) between Columbia and Peru, the International Court of Justice elaborated the positive requirements of a rule of international customary law. In this case, an alleged regional or local custom peculiar to Latin American States : "The party, which relies on a custom of this kind proved that this custom is established in such a manner that it has become binding on the other party. The Columbia Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State". In support of this finding the Court relied expressly on Article 38 (1) of its Statute. In this case it will be seen that the Court laid down two criteria of custom, (1) the existence of a constant and uniform practice, and (2) the acceptance of the custom as rule of international customary law (*opinio juris sive necessitatis*). The former is the material aspect, and the latter, psychological aspect. As regards the material aspect, there must in general be recurrence or repetition of the acts which give birth to the customary rule. As for *opinio juris* is concerned, it is the inference from all the circumstances. One test for the existence of *opinio juris* is that set out in *West Rand Central Gold Mining Co.* v. *R.* (1905) 2 K. B. 391 at p 407. In this case the Court laid down that it must be established beyond doubt that the alleged rule "is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it." However it may also be noted that *opinio juris* is not always essential. Sometimes it may be altogether conspicuous by its absence for as has been rightly said : "The Rubecan which divides custom from the law is crossed silently, *unconsciously*, and without proclamation."

Customary rules crystallise from usages or practices which have evolved in approximately three sets of circumstances :—

(i) diplomatic relations between States ;

(ii) practice of International organs ; and

(iii) State laws, decisions of State Courts, and State military and admnistrative practices.

Judicial application of the custom.—There are number of cases illustrating the judicial application of custom. Two of them may be cited here.

The *Paquete Habana* (1900) 175 U. S. 677. Here the question

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at issue was the legality of the capture during the Spanish American War of certain enemy fishing vessels which it was alleged were exempt from capture by international custom. After an elbaorate review of the international practice in favour of such exemption and of the authorities supporting it, Justice Gray, referring to the work of the jurists and commentators as witnessing the customs and usages of civilized nations explained that "such works are resorted to be judicial tribunals" not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of "what the law really is." But the decision in this case has become very old and it is doubtful whether this will apply in the present developing international law in view of use of widespread aircrafts and atomic weapons, etc.

S. S. Lotus Case (Pub. P. C. I. J. 1927, Series A. No.-10). In this case, the Permanent Court of International Justice held that only the flag State would not be entitled to the exclusive jurisdiction in collision cases. In order to arrive at this decision the Court looked into different sources of international law and concluded that in respect of the collision cases, there is no consistent international custom. But the Geneva Convention on High Seas, 1958, have rendered this decision obsolete. Convention further provides, no arrest or detention of the ships, even as a measure of investigation, shall be ordered by any authorities over than those of the flag State.

Generation by Treaty of customary Rules of International Law :

The provision of a Treaty may also give recognition of the customary International Law. In *North Sea Cantinental Shelf cases*, (1969), the International Court of Justice observed that the treaties generating customary law may be of non-creating character. "The court further observed that the 'norm-cerating process' is a 'perfectly possible and does from time to time occur' it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed."

As pointed out by Anthony D 'Amato', "The World Court's recent decision in the North Sea Continental Shelf cases is a major contribution to the branch of the theory of customary international law dealing with more creation by means of treaty." He again observed, that a great many rules of customary International Law, perhaps even the majority had their origins in treaties, and World Court itself in several cases, for example, *Nottenham case*, (1955), I. C. J. 422-23, has used treaties for evidence of rules of law held binding upon non-parties.

Importance of custom as a source of law.

Brierly points out that because of the slow development of the

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new custom, the importance of custom as a source of international law has been declined. Prof. Leo Gross has rightly remarked that the development of the custom is very slow as compared to the society and rapid changes can be brought about throvgh treaties and conventions so as to be adoptable by the changed society.

The Soviet Union regards custom as an inadequate source of the international law and it can be given effect only by the consent of the parties to it. Thus according to the Soviet view, therfore agreement between States is the only adequate means for the development of International law.

Defects of customary Law :—

Fenwick points out three defects in the customary law—

(1) customary law has been an "uncertain law". Therefore, nations have sometimes not been able to agree on the number of retreated acts which must constitute custom to become the source of general principles of law, whether national or international ;

(2) customary law is too slow to keep pace with the changing relations of States ;

(3) based as it is on precedents, customary law has been found wanting in filling up the gaps existing in the rules of international Law.

Lastly, it may be noted as pointed out by Edward Collins, "international Organisations also contribute to the development of customary International Law by providing a clear concentrated forum of State practice. Particularly in the General Assembly of U. N. where more than States are represented, the statements and the votes of representatives on legal matters provide evidence of existing costomary law, as illustrated by the discussion and the adoption of the resolution affirming the principle of Nuremberg Charter and Judgment Still other resolutions amount to interpretations of the rules and the principle which the Charter already contain and which are in consequence binding upon member States, anthoritative by reason of the standing of U N."

(b) Treaties.—In recent times Treaties have become a very important source of International Law. The importance of the treaties lies in the fact that they embody rules which have been agreed to be binding by the States making them. A treaty is an agreement whereby two or more States establish or seek to establish a relationship between them governed by International Law.

International treaties may be classified into two categories :

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(i) Law-making treaties ;

(ii) Treaty contracts.

(i) Law-Making treaties.—The provisions of law-making treaty are directly the source of International Law. Only the 'Law-making' treaties which lay down general rules binding on the majority of States are good sources of law.

The 'law-making' treaties are "those which a large number of States have concluded for the purpose of either declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of creating some international institution"—*Brierly* :

The law laid down by them may be called Universal International Law. The Peace of Westphalia, 1648 : the Congress of Vienna, 1815 ; the Declaration of Paris, 1856 ; the Geneva Red Cross Convention of 1864 and the General Treaty for the Renunciation of War, 1927, furnish the concrete instances of law-making treaties. All multilateral treaties are not necessarily law-making. A treaty which has been entered into by a small group of States including Great Powers lays down "general International Law." If it is later on acquiesced by the remaining States, it becomes full law-making treaty and source of Universal International Law. A treaty, therefore in order to the law-making must be adopted by all or most of the great States and only then the rules approved by such States "have very great weight in practice even among States which "have never expressly consented to them".

Treaties occupy the most important place amongst the sources of international law, so much so that *Salmond* observes that "The law of Nations is essentially a species of conventional law." There has been an astonishing development of "law-making" treaties since the middle of the nineteenth century.

Law-making treaties perform the same functions in the field of International Law as legislation does in the State field. Law-making treaties are the means through which International Law can be adopted to in accordance with the changing time and circumstances and the rule of law among the States can be strengthened. Treaty process is also a useful means to develop universal international law.

(ii) Treaty contracts.—Starke points out that treaties between States, containing treaty contracts, though not directly a source of International Law, serve the purpose of laying down principles which through their operation constitute to formulation of International Law in the following three cases—

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(i) recurrence of the same principles produces customary International Law and influences diplomatic acts and State Law ;

(ii) the rule in a treaty originally concluded between only a few States, represents the initial state in the process.....by which customary rules of International Law have evolved" ;

(iii) a treaty may serve an evidence in support of a rule of International conduct and thus supplies additional force to that rule.

(C) Decisions of Courts and Tribunals—The decisions of International and National Courts and those of Arbitral Tribunals constitute evidence of the International Law. Oppenheim considers decisions of courts and tribunals as "subsidiary and indirect source of International Law" and adds that they exercise considerable influence as an impartial and well considered statement of the law by jurists of authority made in the light of actual problems which arise before them. The common law doctrine of judicial precedents has no place in international Law and the prior decisions of the International Courts have no binding force. Article 59 of the Statute of the International Court of Justice expressly lays down that "decisions of the Court has no binding force except between the parties and in respect of that particular case". Similar was the rule with regard to the decisions of the Permanent Court of International Justice. The practice of the Permanent Court was to use its prior decisions for guidance only Article 38 (1) (d) of the Statute of International Court of Justice requires the Court in administering International Law to apply judicial decisions as "subsidiary" means for the determination of rules of law. Thus while in principle it does not follow the doctrine of precedent in practice, it ordinarily follows it, so far as advisory opinion of International Court of Justice is concerned, it is not binding at all. But it clarifies the rule of International Law on a particular point or matter.

The decisions in the *Albama Claims* and the *Behring Sea Fisheries* furnish notable instances of the work of Arbitral Tribunals in the development of International Law. The Arbitral Tribunals by the peculiar nature of their jurisdiction are not always competent to elucidate or declare the law. Their jurisdiction is limited by the terms of the agreement of the parties. Sometimes the States lay down the principles of law on which they desire their disputes to be decided and the award that follows on such an agrrement can add nothing to the law. It should be noted, however, as *Starke* points out that the "compromise" element in arbitral adjudication has been unduly exaggerated This is because the arbitrators were authorised to act "*ex acquo et bono*" (equitably in disregard if necessary of existing law) but even in such cases arbitrators did not deviate from judicial principle. Judge J. B. Moore has also expressed his views similar to that of Starke.

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The decisions in national Courts, and particular National Prize Courts which administer not the Municipal but the International Law greatly contributed to the development of the law, because they embody the local interpretations of the principles of Law. The State's judicial decisions may be treated as weighty precedents or even as binding authorities. As was observed by Marshall, C. J. of the United States Supreme Court :

"The decisions of the Courts of every country show how the law of nations, in the given case is understood in that country, and will be considered in adopting the rule which is to prevail in this"—[*Thirty Hogsheads of Sugar, Bentzon* v. *Boyle*, (1815) 9 Cranch 191 at p. 198]. He further observes in the same case 'that so far as these decisions are founded upon a law common to every country, this will be received not as authority but with respect." Fenwick has also pointed out, the decisions of national courts are in fact, positive in character and forming a definite starting-point from which rules of law may develop and have in the past developed.

But in view of some jurists the decision of International Arbitral Tribunals cannot be treated as a source of law. These jurists have rightly too, pointed out that in most of arbitral cases arbitrators act like mediators and diplomats rather than a Judge. Consequently their decisions cannot be treated as source of International Law.

(d) Writings of jurists and commentators.—The opinion of jurists and commentators on matters of International Law contained in their works has no small influence on the development of law. The treatises of Grotius, Suarez and Vattel supply enough material to infer what rules could be relied upon as rules of international conduct. The statute of the International Court of Justice recognizes 'the teaching of the most highly qualified publicists of the various nations as the subsidiary means for the determination of the rules of law.

Juristic works are the evidence of law as described by Gray, J. of the U. S. Supreme Court in Paquete Habanna Case (1900).

In this case Court hold the view that, **".....Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."**

Although juristic work cannot be treated as an independent source of international law, yet the view of jurists may be taken into consideration because it helps in the development of law. The views of the jurist are not direct source of international law

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but they are sometimes instrumental because in the development of international customs.

The importance of the Juristic works lies in the fact that they furnish evidence of custom and usage and deduce rules of law from the materials noticed by them. Lord Coleridge points out in *Rex* v. *Koyn*, (1876) 2 Ex. D. 63–"nevertheless, the unanimous testimony of writers on International Law, extending over a long period of time, may often serve to establish almost conclusively the existence of usage and common agreement among nations." Article 38 of the Statute of International Court of Justice has also recognised the Juristic works as subsidiary means for the determination of the rules of International law.

(e) The general principles of law recognised by civilised nations–By general principles of International Law we mean those principles which have been recognised by almost all the States. Article 38 of the Statute of International Court of Justice authorises the International Court of Justice to apply the general principles of law recognised by civilised nations in order to arrive at a decision in case submitted to it. (Please also see the next question).

Resolutions and Declarations of General Assembly of the U.N.— There are three sets of opinion as to the signification of the resolutions and declarations of the General Assembly as a source of law. One set of opinion is that they have no legal significance. Another set of jurists hold that under certain circumstances they have legal implications. Third set of jurists are of the opinion that they have a binding effect. It was pointed out in *South West African cases* (1966) that the Court shall take into consideration the resolutions of the General Assembly, while giving its decisions only when on a particular subject many similar resolutions have been passed. Prof. Gross points out that the resolutions of law-making character have the force of international law.

Some resolutions of organs of international institutions make the interpretation of different provisions of their constitutional instruments. This decision becomes a part of the law of international institution which in its turn becomes a part of international law. Sometimes some organs of international institutions are empowered to give quasi-judicial decisions.

The resolutions of the General Assembly have very much contributed to the development of the international law. Though some of the resolutions are never implemented, yet they are very helpful in arriving at the agreements between the States. Examples of some of the important law-making resolutions are : Declaration of Principles Governing the Sea-bed and Ocean floor and the subsoil (1973), Universal Declaration of Human Rights 1948), Declaration of Inadmissibility of Intervention (1965) etc.

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Q. 22. Evaluate the juristic significance of the direction to the International Court to apply the 'general principles of law' recognized by civilised nations. (I. A. S. 1964, 1966 and 1972. P. C. S. 1984) Discuss some instances of such application.

Ans. The general principles of law recognized by civilized nations.—The International Court of Justice has been authorized by the Statute to apply the general principles of law recognized by civilized nations in order to arrive at a decision in a case submitted to it. Even before the present Statute, the general principles of law were invoked by one party or the other in cases before International Courts. The Permanent Court of International Justice applied the rule of *res judicata* in the *Chorzow Factory Case*, Pub. P.C I.J. (1928) Series A. No. 17, p. 29 ; and the general principles of subrogation in the case of the Diversion of Water from the Meuse, Pub P.C.I J. (1624) Series A No. 2, p 8. Special arbitration tribunals have resorted to more freely to the general principles of law recognized by civilized nations as one of the law creating processes. Thus, in the *Mazina* and *Wanlia cases* (1928), the Special Arbitral Tribunal between Germany and Portugal recalled Article 38 of the Statute of the World Court and observed : "Finally in the absence of rules of international law which are applicable to the facts in dispute, the arbitrators are of opinion that it is their duty to fill the gap by applying principles of equity, fully taking into account the spirit of international law, which is applied by way of analogy, and its evolution". "It is an authoritative recognition of the function of the Court which administers it" (*Brierly*).

Speaking of the importance of this source of International Law, Prof. Schwarzenberger observes : One of the objects of the parties which choose to settle a dispute by way of arbitration or judicial adjudication is to remove finally such disagreement as may have existed between them. A liberal interpretation of the powers of international institution may, therefore, be thought to correspond to the typical intention of the parties and justify the importation of concepts of morality by way of the general principles of law recognized by civilized nations." *Oppenheim* also expresses the same view : "But paragraph 3 of Article 38 nevertheless constitutes an important landmark in the history of International Law inasmuch as the States parties to the Statute expressly recognize the existence of a third Source of International Law, independent of, although merely supplementary to, custom or treaty." Thus general principle of law recognised by civilized nations are indeed assemble of those general principles which underlie antedate, vary from and form the model of municipal rules of law, which are same in all jurisdictions and aim at justice in every case.

Death knell of positivism.—Prof. Lauterpacht is of the view that the provision for applying "general principles" sounds the

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death knell of positivism. It is a rejection of the positivist doctrine according to which custom and treaties are to be considered the exclusive sources of International Law. This view is also shared by *Oppenheim*. According to him this amounts to the explicit abandonment of the positivist view according to which treaties and customs are the only sources of International Law with the result that in their absence international tribunals are powerless to render decisions. On the other hand, there is Prof. Julius Stone who does not share this view. According to him far from rejecting the positivist theory the incorporation of 'general principles' as a source of international law fortifies and reinforces the positivism. Positivist theory is satisfied by the fact that the Statute is only binding upon States who are parties to it ; they have to the extent of its terms consented to be bound by rules not otherwise derived from their consent. "It might be true indeed to speak of a reinforcement of positivism by the appearance of a new instrument for taking out the inadequate consent of positive law helping to reconcile the boisterous political realities of positivism with its comparative business as a spring of juristic life. *Far from sounding its death knell a great creative role of the Court Under Commission of Article 3, Para 2 may well give positivism a larger life by adopting it to the needs of its own survival.*"

It is, however, beyond doubt that as far as Austinian view of law is concerned, it is certainly a rejection of the positivist doctrine. The positivism might not have been rejected totally but it undergoes a radical transformation and in the long run it is only a shadow of the substance.

The International Courts have recognised as general principle :—

(1) Good–faith.

(2) Responsibility.

(3) Prescription.

(4) In the absence of any express provision to the contrary, every court has right to determine the limits of its own jurisdiction.

(5) One State cannot be a judge or arbitrator in its own case.

(6) *Res judicata.*

(7) In any judicial proceeding the court shall give proper and equal opportunity of hearing to both the parties.

In the following cases, the International Court decided the issues before it according to the general principles of law recognised by civilised nations :—

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(a) Case concerning the Temple of Preah Vihear (1962)—In this case, the International Court of Justice recognized the general principle of estoppel and applied it.

(b) Bracelona Traction Case.—The Preliminary Objections (I C J Rep (1964) p 6).—In this case also, the principle of estoppel was applied by the International Court of Justice.

(c) *R.* v. *Keyn*, (1876) 2 Ex.D 63.—In this case the Court ruled that international law is based on justice, equality and conscience which has been accepted by long practice of States.

(d) *United States* v. *Schooner*.—In this case Justice Storey of U. S. A ruled that international law should be based on general principles of law recognised by civilized States. He was pronouncing the judgment relating to abolition of system of slavery.

Comparative value of the above.—The final question is in what order should these "material sources"—custom, treaties, arbitral and judicial decisions, and juristic works be used by ascertaining law on a given matter. It will be remembered that the order in which the "material sources" were set out in the statute of the International Court of Justice was :—

(1) Treaties and conventions.

(2) Customs.

(3) "General principles of law recognized by civilised nations."

(4) Judicial decisions and juristic opinions.

The order is generally followed in practice. Thus first preference is given to rules laid down in conventions binding the States concerned, and if there are no such rules to established customary rules, the Court applies the general principles of law recognized by civilzed nations. If there is no general principle of law recognized by civilized nations on the matter under dispute, the court then resorts to the judicial decisions and juristic opinion as subsidiary means for determination for the rules of International Law, arbitral and judicial decisions and juristic opinion are resorted to.

CHAPTER IV

CODIFICATION

Q 23. What do you mean by 'codification'? Trace succinctly the history of Codification of International Law evaluating the work done by various agencies in this field. I. A. S. 1966, P. C. S. 1964, 1968 and 1971.

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Ans Meaning of 'Codification'.—The term 'codification' ordinarily means the process of reducing the whole body of law into a Code in the form of enacted law. In the field of International Law the term may mean a systematic arrangement of the rules of law in existence, modification of the existing rules to suit the needs of the times and also formulation of rules on controversial subjects after necessary reconciliation of the divergent views. According to Sir H. Lauterpacht, "the task of codifying of international law, if it is to mean anything, must be primarily one of bringing about an agreed body of rules already covered by customary and conventional agreement of States." In its wider sense, it may also mean modification of existing rules of law, so as to keep them pace with time and adopt them in accordance with the needs of time.

According to R. Y. Zennings, 'codification' means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of the law unchanged, even though this may be true of some cases. In other words codification properly conceived is itself a method of the progressive development of law. Article 15 of the Statute of the International Law, is used for convenience and as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law yet has not been sufficiently developed in the practice of States. The attempt at codification of International Law is more than a century old but the problem of codification has become very acute after the establishment of the United Nations Organisation, with *codification*, as one of the functions of its General Assembly.

History of codification of International Law.—Towards the end of the eighteenth century the idea of codification was first conceived by Bentham who gave to the World Utopian International Law. The earliest effort for codification was made by the French Convention which resolved to draw up a declaration of the Rights of Nations in 1792.

The work of drafting was entrusted to Abbe Gregoire who prepared a draft. This draft was, however, not approved by the convention and the attempt failed.

Declaration of Paris, 1856.— Real codification however, started with the Declaration of Paris signed by Great Britain, France, Russia, Austria, Prussia, Sardinia, and Turkey at the end of the Crimean War. The Declaration laid down the following four principles :

(a) Abolition of privateering ;

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(b) The neutral flag covers enemy goods with the exception of contraband ;

(c) Neutral goods under enemy flag with the exception of the contraband of War are not liable to capture ; and

(d) Blockade, in order to real and binding, must be effective.

Codification by Individual Writers :—The real attempt in the direction of codifying International Law was made in 1861 by an Austrian Jurist, Alfous Von Domin Petruschevecz, who published at Leipzing his code entitled '*Preis dun code de droit international*'. In 1863 Prof. Francis Leiber of Columbia University Law School, Newyork, attempted to codify the law of war.

The American Civil War stimulated an interest in the codification of International Law with the result that in 1863 Professor Francis Leiber of the University of Columbia drafted a code of laws of war on land at the request of President Lincoln. The Government of the United States published this code as "Instructions for the Government of Armies of United States on the Field".

In 1868, Bluntschli the celebrated Swiss jurist, published his Code of International Law containing 862 articles with the object of clearly formulating the existing ideas of civilized world.

In 1872, David Dudley Field brought out at New York his Draft Outlines of an International Code, containing 1,008 articles.

Besides them, Leon Levi in 1887, Italian Jurist Pasquale Fiore in 1890, E. Duplexis in 1906, Epatacio Pessoa in 1910, Jerome Internoscia in 1911 published their codes of International Law.

Among modern writers who presented the rules of International Law in a systematic form of Code are Oppenheim, Hall Philimore and Hyde.

Codification by Associations —The Institute of International Law, a body of jurists founded in 1873 at Ghent in Belgium produced valuable Code touching a number of subjects of, International Law. This body of jurists met periodically and an account of its codification of International Law appears in the successive issues of *Annuaira*. Another association which was founded about the same time and which made notable contributions towards codification of International Law was the Association for the Reform and Codification of the law of Nations. This Association in 1934 adopted a series of resolutions proposing measures that might be taken against violations of the Pact of Paris. The codification projects of the Harvard Research Centre during the period between the two World Wars are invaluable. The American Institute of Interna-

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tional Law which came into existence in 1915 brought out a number of codes on various international subjects. Its first code under the title of 'Declartion of the Rights and Duties of Nations' appeared in 1916.

Codification by Regional Groups.—A conference of American States meeting at Maxico in 1901-1902 arrived at a Convention which provided for the preparation of codes on public and private International law. In 1906 a committee of International jurists was appointed to carry on the work of codification. The American Institute of International Law submitted a number of codificatian projects to the American Conference in 1924. In 1928, the American Conference adopted coventions approving seven out of the twelve codes submitted by the American Institute of International Law. These approved Codes were on :—(1) The Status of Aliens ; (2) Duties of Netural States in the event of civil strife ; (3) Treaties ; (4) Diplomatic functionaries ; (5) Consular agents ; (6) Maritime Neutrality ; and (7) Asylum. Under the auspices of the American Conference the Permanent Committee of *Rio de Janeiro*. Habana and Montevideo and a new International Conference of American jurists were formed for the purpose of codifying the law. In 1959 the Inter-American Neutrality Committee was appointed to propose an exclusive code on the laws of neutrality.

The Two Hague Conferences.—The first Hague Conference, which was convened in 1899 resulted in the adoption of following two conventions in the form of a code :—

(1) Convention for the Pacific Settlement of International Disputes, and

(2) Convention with respect to the laws and custom of War on Land.

These Conventions proved landmark in the field of codification of International Law.

Codification under League of Nations —The matter of codification of International Law was also taken up by the League of Nations. In 1924, the Assembly of the League appointed a committee of sixteen jurists to report on codifications of International Law. This committee drew up a list of topics which were ripe for codification. In 1927, this report of the committee was considered by the Assembly and it has decided to hold a conference at Hague for cod fying the law on Nationality ; Territorial Waters ; and Responsibility of States for damage done in their territory to the persons or property of foreigners. The first conference of the Progressive Codification of International Law was held at the Hague in 1930. Three conventions, *viz* convention concerning certain questions relating to conflict of Nationality Laws, a protocol relating to military obligations in certain cases of Double nationality and a protocol and a special protocol relating to certain cases of stateless-

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ness were adopted by this conference. A number of States including Great Britain have ratified these conventions.

The Council of the League in 1925 convened a special conference which resulted in a protocol which has now been ratified by as many as forty States. This protocol is important inasmuch as it aims at laying down rules prohibiting the use of poisonous and asphyxiating gases. Many other general conventions concerning a variety of topics, *e. g.* conventions in the treatment of prisoners of war, the sick and the wounded, conventions concerning air, navigation and conventions concerning scientific, economic and humanitarian problems were arrived at under the auspices of the League of Nations. These conventions constitute a step towards systematic codification. The committee of experts did not cease its work and reported in 1928 to the Council that the following topics were also ripe for codification :

(1) Law relating to functions and competence of Counsels ; and

(2) the competence of the Courts regarding foreign States.

The United Nations —The Charter of the United Nations lays down in Article 13 that the General Assembly shall initiate studies and make recommendation for the purpose of 'encouraging' the progressive development of International Law and its codification.

International Law Commission —The second General Assembly on November 21, 1947 decided to set up an International Law Commission to present a restatement of the rules of International Law on certain subjects Accordingly, an International Law Commission was elected and met on April 11, 1949. The following subjects are referred to in the Statute of the Commission :—

(1) Rights and Duties of State.

(2) Nuremberg Principles.

(3) International Criminal Jurisdiction.

Besides the suggestion was also made to refer the following matters :

1. Human Rights.
2. Genocide.
3. Status of women.
4. Reparation for injuries suffered by United Nations officials.

The Commission began its work in 1949 and since then it has done commendable work in respect of the codification of international law. It decided to give priority to the following three topics :

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(i) Law of treaties.

(ii) Arbitral procedure.

(iii) Law relating to high seas.

By the year 1971, the Commission submitted final draft or reports relating to (1) regime of High Seas, (2) Regime of territorial waters, (3) Nationality (including statelessness), (4) Law of treaties, (5) Diplomatic intercourse and Immunities, (6) Consular Intercourse and immunities, and (7) Arbitral procedure.

R. Y. Zenning remarked, "The most important task of codification is the systematisation and the progressive development of this aniorphous and relatively unorganised body of law."

Q. 24. Point out the advantages and disadvantages of codification of International Law. Discuss its limits and prospects.

Ans. Codification—Its advantages and disadvantages :

Advantages—The advantages of the codification may briefly be noted thus :—

(a) International Law is uncertain and obscure in various respects. Codification will make the rules certain and clear and will stimulate a desire in the States to refer to them readily.

(b) There are numerous gaps in the law so that many matters have not yielded to any rule. If the law is codified these gaps will be filled up and the law will be full and complete.

(c) Codification will bring uniformity into the system.

(d) Disagreement and controversy that prevails on many matters will disappear when codification will aim at agreed rules by means of conventions. Codification will facilitate the solution of most matters which often lead to prolonged differences between States.

(e) Codification is likely to increase the binding force of the rules and will enable the States more readily either to follow the rules or to submit the matter to the International Court, if they have doubt as to the correctness of the interpretation of the particular rule.

(f) The International Court and arbitral tribunals, will find it very easy to decide the dispute if they have before them the whole law in the form of a Code.

(g) Custom because of its slow growth cannot keep pace with the changing times and customary rules are not likely to fit in with the needs of a changed society. Codified law can be easily amended on change of circumstances.

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Disadvantages.—(a) The sure growth of customary law which embodies the wisdom and rich experience of ages is obstructed if law assumes the form of a Code. This defect can be remedied by a regular and scientific revision of Codes in order to incorporate changes in international conditions.

(b) Codification renders the law rigid so that a particular case may fall outside the scope of law. Law gets inadoptability from codification. Too much rigidity which will result from codification will act as an insurmountable difficulty in the application of the rules to new situations.

(c) Codification leads to controversy in interpretation which takes the form of hair-splitting resulting in adherence to the letter rather than the spirit of the law.

(d) Codification brings in new and fresh controversies in law.

(e) Codification also makes the law too formal and conservative but this defect can be removed by progressive interpretation of international law.

(f) International law still being in its infancy, only a partial codification is possible.

Limits and prospects—The codification of International Law is a very difficult task as its true codification is only possible to the extent that decisions can be obtained for the draftman's guidance as to the law which the Court is to contain.

A Code to be readily useful to the nations must contain agreed rules on nearly all the various topics consistent with the need of the present society of nations. At preseni there are many points in which it is difficult to find out an acceptable rule, there are innumerable controversies on several topics and there are many unregulated matters on which jurists widely differ.

Oppenheim says that the experience and results of the Hague Conference of 1930, made it possible to assess desirability and the prospects of the codification. The difficulties in this regard may be summed up as follows :—

(i) Firstly, the Hague Conference revealed clearly the difference between codification conceived as a systemisation and unification of agreed principles and codification regarded as agreement on hitherto divergent State practice, which demonstrated the necessity of different methods for achieving the fulfilment of the two different purposes and pointed out in bold letters that the securing of agreement on existing differences is primarily a matter of policy that cannot be well settled by conferences of legal experts.

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(ii) Secondly, there is a danger in view of the fact that decisions in such conferences are to bear the stamp of unanimity, that attempt to teach agreement in the form of codified rules may result in reducing the value of the rules eventually agreed upon for the reason that it may be unduly determined by the most persistent or least progressive States. The product of codification may thus regard instead of advancing the progress of International Law.

(iii) Thirdly, there is the danger that gives the cautious attitude of the governments. Attempts at codification, may in numerous cases, reveal and emphasize difference in cases where the agreement was hitharto supposed to exist.

(iv) Fourthly, in so far as codification implies uniform regulation, its scope must necessarily be limited for the reason that in many cases the diversity of interests and conditions render uniformity difficult or undesirable.

(v) Fifthly, the conference showed that even with regard to generally non-controversial matters the work of codification required lenghty preparation and discussions which cannot always usefully take place in the hurried atmosphere of an international conference.

Oppenheim, however is of the opinion that in spite of the above difficulties and obstacles there is no sufficient reason for abandoning the task of introducing, through general convention, uniformity and certainty in these branches of International Law which are sufficiently developed for that purposes.

If the study of the law scientifically made both by the national and central bodies and if the States take a detached view of the science of International Law, the codification will be successful and International Law will become a Role of developed system. Sri R. S. Pathak in his work "the State and Means of Codification and Progressive Development of International law" (I J. I. L. Vol. 17 (1977) p. 137 at p. 145 assumes profound significance also because of the complex nature of growing international relations which call for particular formulation and enactment. The articulate and specific instruments of law-making, bilateral or multilateral treaties constitute the effective vehicle for regulating international or transnational interests concerning communications, health, conservations of resources, labour and social matters and space law.

Following were most important works of the Commission :—

(1) It prepared a Draft relating to the rights and duties of the States and a Code of offences against the peace and security of mankind.

(2) Formulation of the Nuremberg principles.

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(3) It defined the term 'aggression' which was accepted by the General Assembly and recommended for the establishment of the International Court for trying persons accused of genocide and certain other crimes.

(4) A Draft relating to statelessness, Nationality and arbitral procedure was also prepared.

(5) The Drafts on High Seas, Law of Treaties and Territorial Sea were also prepared.

Present Commission has to submit its report on the following subjects :—

(a) The most favoured Nation clause ;

(b) State responsibility ;

(c) Succession of States in Matters other than Treaties ; and

(d) Law of Non-Navigational uses of International water courses.

The term of the old Commission expired on December 31, 1976, and new Commission constituted by the General Assembly for five years started its function from 1st Jan. 1977. Dr. S. P. Jagota of India was also elected one of the members of the Commission. The International Law Commission has completed its work on State Succession and on 24th November 1976 the General Assembly decided to hold a plenipotentiary Conference in April-May, 1977 for consideration of draft articles on succession of States in respect of treaties adopted by the Commission on its 26th session. This new Commission also expired on December 31, 1982.

Recent Conventions and Treaties :—

Vienna Convention on Consular Relations, 1963, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973, International Covenants on Human Rights, 1966 etc.

CHAPTER V

INTERNATIONAL LAW AND MUNICIPAL LAW

Q. 25. Discuss the relationship between Public International Law and Municipal Law by reference to English, American and on Illegal systems Are you prepared to accept Blackstone's view that the Law of Nations is part of the Law of England ?

State Briefly the various theories that are advocated to decide the question of relationship of International Law or State Law

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(I.A.S. 1976, 1974, 1963. 1968, 1957 ; P.C.S. 1987, 1985, 1977, 1976, 1974, 1972), C.S.E. 1986.

A. Theories on relationship of International Law and Municipal Law.—International Law differs from the Municipal Law of a State, for while the former governs the mutual relations of the States, the latter regulates the conduct of the individuals within the State. On the question as to how International Law is related to Municipal Law of the various States, the jurists are not unanimous. The divergence of opinion that prevails has given rise to the following theories on the relationship between International Law and Municipal Law :

(1) Monistic Theory.

(2) Dualistic Theory.

(3) Transformation Theory.

(4) Delegation Theory.

(1) Monistic Theory.—The exponent of this theory emphasise the scientific analysis of internal structure of law. According to them, law is unified branch of knowledge, no matter whether it applies on persons or other entities.

(a) That unity pervades through the science of law. The two systems of Municipal and International Law are two phases of the single legal order. They are not independent systems.

(b) That the International and Municipal Laws are not different from each other. The Municipal Law govern the conduct of the individual in the State. The International Law though addressed to the States as corporate bodies ultimately reaches the individuals, for States are but groups of individuals.

(c) That both the International and Municipal Laws are imperative in their nature ; the States are corporate body under the former by reason of its Statehood and individual under the latter are absolutely bound independent of their will.

(d) That both systems have their origin in a '*higher law*' which is formed upon the principles of right and wrong. The concept of equality of States under the International Law and the principles of equality before the law are both drawn from the same source.

(e) That, in fact, there is no conflict between International Law and Municipal Law, for a State is never ready to fulfil its international obligations even though there has been violations under its law.

Kelsen is the foremost exponent of this theory. There are other

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writers who support monistic theory for less abstract reasons and maintain that International Law and State Law are both part of universal body of legal rules binding all human beings collectively or singly. Thus in view of monistic writters, in the ultimate analysis of law we find that man is at the root of all laws, all laws are made for men and men only in the ultimate analysis As Judge Lauterpacht says : *It is true that International Law, is made for States and not States for International Law, but is true only in the sense that the State is made for human beings and not human beings for the State.*'' It may be noted here that the Soviet system is generally based on dualism but there are some elements of monism also in Soviet system. For example, according to the Soviet view, both the State law and international law express the prevailing will of the people.

Criticism.—The theory of monism is a very rational one. The view of Kelson, one of the exponents of this school, cannot be dispensed with easily. Kelson expressed that the aim of all law is ultimately man. But in actual practice this norm is not followed by the States. Members of the 'International Society' i. e. States contend that Municipal Law and International Law are two separate branches of law. Each State being sovereign is not bound by international law, States follow international law because of their consent to be bound and on account of certain other reasons.

(2) Dualistic Theory.—The chief exponents of this theory are Triepel and Anzilotti. The theory which is also subscribed to by Oppenheim, is as follows :—

(a) The two systems of International and Municipal Laws are quite different and distinct from each other. International Law has its source in treaties and custom within the society of nations while Municipal Laws are either enacted laws or customary laws.

(b) Municipal Laws regulate the conduct of individuals while International Law regulates the mutual relations of States. The Municipal Laws are commands of a political superior while International Law is not a command but depends on the will of the States.

(c) That the two laws are quite independent, each having its sphere of operation. They do not come into conflict with each other. The one is not at all related to the other.

(d) That International Law cannot reach the individual unless it has been either wholly or partially adopted by the Municipal Law of the State.

Thus, according to the dualist view, the systems of International and Municipal Laws are separate and self-contained to the

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extent to which rules of one are not expressly or tacitly received into the other system"—Schwarzenberger.

Dr. Ross too regards that dualistic theory is sound. According to him "National Law is not derived from International Law." International Law and National Law are independent systems. Their inter-connection lies partly in the demands that International Law makes on national law ; partly in reference to one another.

Criticism.—It is not correct to say that International Law is binding only on States. In the modern period, International Law is applicable on States, individuals and certain other non-State entities. Besides, this conception of State's will as the source of State law is incorrect. In fact State will is nothing but the will of people who compose it. Similarly, it is not correct to say that the origin of or source of International Law is common will of the State. There are certain fundamental principles of International Law which are binding upon the State, even against their will.

(3) Transformation Theory.—This theory is advanced by some writers to explain particularly the relation between a treaty and the International Law. The exponents of this theory maintain that a treaty can bind the subject of a State only when it has been transformed into laws of the State. They regard that in order that a treaty or convention may reach the individuals, it is absolutely necessary that transformation of the treaty or convention into national order should take place.

Criticism.—This theory being on the dualistic view already stated cannot be accepted. It loses sight of a distinction which really exists between implementation and transformation. A State only implements the rules of International Law when it enacts laws for its subjects in conformity with the terms of a treaty. Kelsen points out ; If a treaty imposes upon a State an obligation which can be fulfilled only by a legislative act, this act is, as pointed out, no transformation of International Law into national law undertaken for the purpose of making the application of the treaty possible, but the direct application of the treaty by the competent organ. There is also no transformation which according to constitutional provisions a State is obliged to obtain approval of its legislature with regard to its treaties because the legislature in approving the treaty only participates in the conclusion of the treaty and does not work out a transformation. Moreover, the transformation, if it takes place at all, is concern of the national order and is not a matter of International Law.

Delegation Theory.—Delegation theory asserts that International Law constitutes kind of a general constitution which delegates to each State the competence to enact laws in conformity with the rules of International Law. According to this theory the

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State is grounded upon International Law and that International Law loses its validity if it conflicts with Municipal Law.

Thus, there is a great controversy in regard to application of International Law in the field of Municipal Law. In order to arrive at the right conclusion, it is necessary to go through the practice of States in this respect. But before we do so, it will be desirable first to consider the question of primacy. In other words if there is a conflict between International Law and State Law, which will prevail ?

This theory assumes the primacy of international legal order. It does not fit in with actual facts inasmuch as the national legal order does not always yield to international legal order.

Question of primacy :

The exponents of the dualistic theory hold that in the case of the conflict between the International Law and Municipal Law, the State Law shall prevail because the State is independent and sovereign. But the supporters of the monistic theory are not in agreement. Kelson is of the opinion that the primacy will depend upon the facts and circumstances of the case. But some are of the opinion that there will be the primacy of the International Law.

If we accept the theory that the State law shall prevail, it will result in the primacy of the laws of all the States which are conflicting with each other and it will create anarchy and disorder in the international field.

British Practice—Blackstone's view.—The statement of Blackstone that the International Law "is here adopted in its full extent by the common law, and is held to be a part of the law of the land" expresses the British attitude with regard to customary International Law which has been universally recognized or assented to by Great Britain.

British practice in regard to customary rules of International Law.—In Britain customary rules of International Law are treated as a part of British laws. As pointed out by the Starke, British Courts treat customary rules of International Law as a part of their own law subject to the following two conditions :

(i) Rules of International Law should not be inconsistent with the British Statute.

(ii) If the highest court once determines the scope of the customary rules of International Law, then all the Courts in Britain are bound by it.

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Lord Atkin in the well known case of *Chung Chi Ching* v. *The King*, (1905) 2 K B. 391, gives the British trend in these words :

"The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they see to ascertain what relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

The well-known *Franconia case* in 1876 is sometimes cited as laying down a rule contrary to the doctrine of Blanckstone above referred to but on a careful analysis it would appear that the direct issue in that case was whether English Courts had jurisdiction over crimes committed by foreigners in the British maritime belt. The facts of that case were ;

A German vessel Franconia while passing through the British Maritime belt within three miles of Dover collided with a British vessel which sank. A passenger on the British vessel was drowned and the captain of the German vessel was tried and found guilty by a British Court. On the question of the jurisdiction, the majority held that the Courts had no jurisdiction over crimes committed by foreigners in the British maritimes belt and Keyn could not be convicted (*R.* v. *Keyn*, (1876) 2 Ex. D. 63). In a latter case it was held that International Law sought to be applied, must be proved by satisfactory evidence showing that the particular proposition put forward has been recognized and acted upon by Great Britain or that it was of such a nature and has been so widely and generally accepted that it could hardly by supposed that any civilized States would repudiate it. [*West Rand Central Gold Mining Company* v. *Rex*, (1905) 2 K.B. 39].

The British practice may be summed up as follows :—

(a) It is also a condition precedent that the rule has the merit of general acceptance by the international community. It is recognized prerequisite of the adoption in our Municipal Law of a doctrine of public International Law that it shall have attained the position of general acceptance by the civilized nations as a rule of international conduct ; evidenced by international treaties and conventions, authoritative text-books, practice and decisions". Per Lord Mac Millan in, *Compania Naviera Vanscongado* v. *Cristina S.S.*, (1938) A.C. 485 at p. 497.

(b) International Law based on treaties affecting private rights is not a part of the law unless Parliament gives its assent to the treaty by an enabling Act.

American practice.—International customary laws, as has been

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universally recognized or has been assented to by America is binding on American courts even if the International Law is in conflict with the previous Municipal Laws. According to American practice rules laid down by treaties :—

(i) International Law based on coventions and treaties entered into by America overrides existing Municipal Law and is absolutely binding on American courts provided that there is nothing in International Law repugnant to the American Constitution.

(ii) The Municipal Law making provisions in violation of the existing International Law is binding on American courts and the International Law thus overriden has no force.

American practice regarding customary rules of International Law :—The American practice regarding customary rules of International Law is more or less same as British practice. In America also customary rules of International Law are treated as a part of American Law. In cases where there is a doubt as to whether the International Law has been abrogated by the Municipal Law, the presumption that legislature did not intend to override the International Law will apply. The American tendency is clear from the decision of Mr. Justice Gray in the *Pacquete Habana's case*, (1900) 175 U. S. 677, where it was observed that International Law is a part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as question of right depending upon it are duly presented for their determination. For this purpose where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

India—Article 51 of the Constitution of India shows Indian view with regard to the relationship of International Law and Municipal Law. According to this Article, International Law shall endeavour to—

(a) promote International peace and security ;

(b) maintain just and honourable relations between nations ;

(c) foster respect for International Law and treaty obligations in the dealings of organised peoples with one another ; and

(d) encourage State of International disputes by arbitration. It would appear, that the relationship between International Law and Municipal Law is almost the same as in England. This view was also expressed by the Calcutta High Court in one of the cases. In interpreting and applying Municipal Law, these courts would try to adopt such a construction as would not bring it into conflict with rights and obligations deducible from rules of International

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Law. If such rules or rights or obligations are inconsistent with the positive regulations of Municipal Law, Municipal Courts cannot override the latter". (*Sri Krishna Sharma* v. *State of West Bengal*, 1954 Cr. L. J. 1722).

But, Article 51 does not give any clear guidance regarding the position of International Law in India as well as the relationship of Municipal Law and International Law because this Article is contained in Part IV of the Constitution ; which deals with the 'Directive Principles of State Policy.' Article 37 of the Part IV clearly provides that the provision contained in this part shall not be enforceable by any court. As pointed out by Prof. S.K. Agarwala : This Article (51) falls in the Chapter on Directive Principles of State Policy, which are not justifiable. Secondly, it is doubtful if the expression 'State' includes the court also within its ambit and if the Directive Principles have been addressed to them too.

Q. 26. Write a critical note on the operation of Municipal Law within the international sphere.

How far do you think it is in accord with the spirit of International Law for a State to set up its Constitution and laws as an excuse for failure to fulfil a treaty obligation ? (P. C. S. 1987, 1985).

A. International Tribunals and the operation of Municipal Law—The fact that the Municipal Courts must pay primary regard to Municipal Law in the event of conflict with International Law, in no way affects the obligations of the State concerned to perform its international obligations. A municipal Court which defers to Municipal Law, notwithstanding an inconsistent rule of International Law, itself acts in breach of International Law and will, as an organ of the State, engage the international responsibility of State, Hence, before an international tribunal, a respondent State cannot plead that its Municipal Law [not even its constitution—See *Advisory Opinion on the Treatment of Polish Nationals in Danzig* Pub. P.C.I.J. (1932) Series A/B No. 44 at p. 24] contains rules which conflict with International Law, nor can it plead the absence of any legislative provision or of a rule of International Law as a defence to a charge that it has broken International Law. This point was well put by the Arbitration in the *Finnish Ships Arbitration* :

"As to the manner in which its Municipal Law is framed the State has, under International Law, a complete liberty of action, and its Municipal Law is a domestic matter in which no other State entitled to concern itself, provided that the Municipal Law is such as to give effect to all the international obligations of the State."

This may even import a duty upon a State, in an appropriate case, to pass the necessary legislation to fulfil its international

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obligation [See *Advisory Opinion on the Exchange of Greek and Turkish Populations* P. C. I. J. (1925), Series B No. 10 at p. 20]. To this extent, the primacy of International Law is preserved.

The overriding regard for International Law before international tribunals does not mean that the rules of Municipal Law are irrelevant in cases before international tribunals. Frequently, on the threshold of the determination of some international claim, it is necessary for an international tribunal to ascertain or interpret or apply Municipal Law, for example, where it is claimed that a denial of justice by a municipal tribunal has taken place, or where a treaty provision, calling for interpretation, refers to Municipal Law. Again, international tribunals are often constrained to consider the Municipal Law of States generally to ascertain whether cumulatively they lead to the inference that a customary rule of International Law has evolved. [As in the *Lotus Case*, (1972) Pub. P. C I. J. Series A. No. 10].

In this connection, a close study of the pleading and arguments in the cases decided by the Permanent Court of International Justice and its present successor, the International Court of Justice, shows Municipal Law has played a very important role in each instance. Indeed few are the cases in which these Courts have reached a solution without the most minute examination of the Municipal Law relevant to the questions calling for determination.

PART II

LAW OF PEACE

State As Subject Of International Law

Q. 27. What do you mean by 'State' in International Law. Discuss the essential characteristics of a State. Suitably classify different types of States for the purposes of International Law.

A. Definition—State is the main subject of International Law. It is hard to define the term State but certain jurists have defined it as follows :—

Salmond.—Defines State, "as a society of men established for the maintenance of peace and justice within a determined territory by way of force."

Fenwick—"As understood in International Law, State is a permanently organised political society occupying a fixed territory, and enjoying within the borders of that territory freedom from control by any other State, so that it is able to be a free agent before the world."

Lawrence.—"A State, may be defined as a political community,

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the members of which are bound together by the tie of common subjection to some Central authority, whose commands the bulk of them habitually obey."

Pitt Cobbett.—According to him, for the purposes of International Law a State denotes "not merely an organised community but an organised community possessing certain qualifications which are deemed essential to the maintenance of international relations." He defines State as "a people permanently occupying a fixed territory : bound together by one body politic by common subjection to some definite sovereign authority ; exercising through the medium of an organised Government a control over all persons and things within its territory ; and above all capable of maintaining relations of peace and war with other communities."

Oppenheim.—"A State proper in contradiction to colonies and dominions is in existence when a people is settled in a country under its own sovereign Government "

"Starke has rightly pointed out that an ideal definition of term "State" is not possible. But in the modern period it is finally settled as to what are the essential elements of State.

Essential characteristics of State.—According to Article 1 of the Montevideo Convention of 1933, the State as a person of International law should possess the following qualifications—

(a) a permanent population ; (b) a defined territory ; (c) a Government ; and (d) a capacity to enter into relations with other States."

The famous jurist Holland has fovoured one more essential element, namely, to some extent 'civilization' because of which the State becomes the member of international community.

As to (b), a fixed territory is not essential to the existence of State, although in fact all modern States are contained within territorial limits, for instance Israel was admitted as a Member of the U. N. O. in 1949, notwithstanding the fact that its boundaries were not then defined with precision, pending negotiations regarding demarcation.

As regards (c) a Government to which the population renders habitual obedience is sufficient. The temporary exile of the Government while an aggressor State is in military occupation does not result in the disappearance of the State.

So far as International Law is concerned the qualification (d) is most important. A State must have recognized capacity to maintain external relations with other States. This distinguishes States proper from lesser units such as Members of a Federation, or Protec-

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torates, which do not manage their own foreign affairs ; and are not recognized by other States as full-fledged members of the international community.

Holland has added additional element—*viz*—.Civilization because of which the State becomes the member of International Community.

Kelsen's—Conception of the State emphasizes that it is purely a technical notion expressing the fact that a certain body of legal rules binds a certain group of individuals living within a defined territorial area ; in other words, the State and the law are synonymous terms.

Classification of States. —One of the essential conditions of the Statehood is that a State must be independent in its affairs. All States do not enjoy full independence and within the Family of Nations are also included States which have their freedom controlled in some measure by other States. So the States are to be classified on the basis of the degree of independence which they enjoy. Thus, classified States fall into either of the following categories :

(a) Full Sovereign and Independent States.—An independent State manages both its internal and external affiairs without interference from any other State. It is a full sovereign State and is a perfact international person. In the modern period the credit of propounding the concept of sovereignty goes to Jean Bodin who in 1976 in his book "De Republic" has put forward the conception of sovereignty. According to him the essential element of sovereignty is the law-making power of the sovereign.

(b) Not full sovereign and dependent States—A State which has its freedom controlled by some other State is a dependent State. The idea of dependence implies a relation between a superior State and an inferior State ; a relation between superiority and subordination. Dependent States are not full sovereign States inasmuch as they do not possess supreme authority and independence with regard to some of their functions. Howvever, "it is not necessary for a State to be independent in order to be a State of International Law"—(Westlake), Dependent States are imperfact International persons. Thus, a protectorate State, though not completely independent, can remain a State under International Law and may possess certain rights and immunities.

Q. 28. "All authorities agree that sovereign States are subjects of International Law". Comments.

Ans. According to old juristic thought the obvious answer will be that States alone are the subjects of International Law, for it is States to which International Law is addressed and it is State

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to which that law attributes rights and duties. Thus Oppenheim holds that States alone are subjects of International Law, and the individuals are the objects of the Law of Nations. According to Lawrence, "all authorities agree that sovereign States are subjects of International Law." Hall also considers only independent States in their corporate capacity as subjects of International Law. The exponents of this theory, argue that International Law is not concerned directly with the individuals and it only aims at regulating the conduct of the States. They illustrate their proposition by the statement that it is States which make peace or war, enter into treaties, meet at international conference, discuss matters of common interest and figure as litigants before the International Court of Justice. These jurists altogether ignored the ultimate aim of all laws in general and of International Law in particular and thus left out of account the position of the individuals in the scheme of international order.

Note.—For Status of individual under International Law see the answer to question No. 36.

Q. 29. Write Short notes on following—

(A) Sovereignty* and Independence (IAS 1991).*

(B) Equality of nations in theory and practice.

The concept of equal status for States in International Law continues to be a myth. Do you agree ? (IAS 1989).

A. Sovereignty and independence—A reconciliation of the concept of sovereignty with the principles of International Law was sought to be brought by a theory known as 'Auto Limitation Theory'. This theory assumes that the State is endowed with the supreme power and a will giving expression to that supreme power and argues that the sovereign will of the State voluntarily yields to the injunctions of International Law. Such a theory in essence means that it is the State alone that can limit its sovereignty. At present there is hardly a State which, in the interests, of the international community, has not accepted restriction on its liberty of action. That most States are members of the United Nations and the International Labour Organization, in relation to which they have undertaken obligations which limit their unfettered discretion in matters of international policy." Therefore, it is probably more accurate to say that the sovereignty of a State means the *residum* of power which it possesses within the confines laid down by international Law"—*Starke.*

Relation of Sovereignty and Independence—International Law recognizes that all States, though politically unequal, are equal before the law. This doctrine was espoused early in the history of

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International law by the "nationalist" writers. The Charter of the United Nations Organisation in Article 2 proclaims that the organisation is based on the principle of sovereign equality of all its members. The principle of equality among States in International Law means that all States have the same right and the same obligations. "Thus every State, says *Fenwick*, "has the same right to national security and the same obligation to respect the security of another, every State has the same right to independence, that is, to determine domestic and foreign policies without interference, and to exercise jurisdiction within fixed boundaries and the same obligation to refrain from interfering or intervening in the domestic affairs of another State ; every State has the same right to purchase and sell territory, to use freely the high seas, to send and receive diplomatic agents and to negotiate agreements which may be mutually satisfactory".

The doctrine of equality ensures that no State is bound by a new rule of International Law unless it has been expressly or tacitly assented by it.

Oppenheim points out following consequences of the concept of equality :—

(1) When there is a question which has to be settled by consent, every State has a right to vote.

(2) The vote of the weakest and smallest State has as much weight as the weight of the largest and most powerful.

(3) No State can claim jurisdiction over another and, therefore, although States can sue in the foreign courts, they cannot, as a rule, be sued unless they submit to the jurisdiction of the court concerned.

(4) The courts of one State cannot question the validity or legality of the official acts of another State.

The doctrine imparts not merely equality at law, but also capacity for equal rights. One consequence of the principle of equality is that in the absence of a treaty, no State can claim jurisdiction over or in respect of another sovereign State. A more far reaching proposition is that the Courts of one State cannot question the validity or legality of the acts of State of another sovereign country.

The veto of the permanent members in the Security Council is an exception to this rule.

Principle of equality in practice.—In practice there has been at all material times a deliberate violation of the rule in practice. The stronger and powerful States have been dominating the weaker

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and the less powerful States. Under the covenant of the League of Nations, there was a significant departure from the principle of equality in the composition of the Security Council as the right of veto is given to the permanent members of the Council. The principle of "the sovereign equality of its members" abrogate the principle of the equality of the States. Though the principle of equality of States has been strictly adhered to in the composition of the General Assembly, yet it has been diluted in the composition of the Security Council.

The principle of sovereign equality of States has also been modified significantly in the Constitution of World Bank, International Monetary Bank, and some other specialized agencies. The principle of sovereign equality of State under the U N. Charter has been discussed in a little greater detail under the heading "Principle of U.N" under the Charter entitled is purposes, principles, membership etc. of the U.N.

Q. 30. What do you mean by the following doctrines :

(a) Doctrine of Basic Rights and Duties of States. I.A S. 1974.

(b) Mnroe Doctrine. [I.A.S. 1973]

Discuss the above doctrines with critical appreciation.

Ans (a) Doctrine of Basic Rights and Duties of States —There are many writers who have tried to formulate lists of so-called "basic" or "fundamental" rights and duties of States. Such formulation have also been a persistent pre-occupation of international conferences of international bodies ; among them may be mentioned those of the American Institute of International Law in 1916, the Montevideo Convention of 1933 on the rights and duties of States and the Draft Declaration on the rights and duties of State drawn up by the International Law Commission of the United Nations in 1949.

The rights listed by the Commission in the Draft Declaration included the rights of States to independence of territorial jurisdiction to equality in law with other States and to self-defence against armed attack. The duties included those of not intervening in the affairs of other States, of not fomenting civil strife in other States, of observing human rights, of settling disputes peacefully, of not resorting to war as an instrument of national policy, and of carrying out in good faith obligations under treaty.

The Draft Declaration still remains a draft under study by Governments, and has failed to command general adoption.

The doctrine of basic rights and duties was favoured by certain naturalist writers ; being derived by them from the notions of the

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State as a creature of natural law; twentieth century formulations of the doctrine, especially those made in the Latin American States, appear on the other hand to be directed towards the establishment of the universal standards of law and justice in international relations, and this indeed seems to be the object of the Draft Declaration of 1949. The basic rights most frequently stressed have been those of the independence and equality of territorial jurisdiction and of self defence or self-preservation. The basic duties emphasised have been, or among other, those of not resorting to war, carrying out in good faith treaty obligations, and of not intervening in the affairs of other States.

There are grounds for scepticism as to the utility of the doctrine. Certain of the rights and duties declared to be "basic" seem no more fundamental than other rights and duties not so formulated, or to be no more than restatements of truisms or axioms of international law itself, for example, the alleged basic duty to observe international law itself, or to be sweepingly general to be accurate. Also, although sometimes international tribunals have invoked a certain basic right or duty in determining the rules governing the case before them, it may seriously be questioned whether this was necessary for the purpose of their reaching a decision.

(b) Monroe Doctrine.—Starke says, the history of the American Monroe Doctrine throws some light on the political, as distinct from the legal aspects of interventions. As originally announced by President Monroe in a message to Congress in 1823, it contained following four branches :—

(a) a declaration that the American continent would no longer be a subject for future colonisation by a European power ;

(b) a declaration that North and South America would be the sphere of the influence of the United States, for maintaining peace ;

(c) a declaration of absence of interest in European wars or European affairs ;

(d) a declaration that any attempt by the European powers "to extend their system" to any portion of the American Continent would be regarded as "dangerous" to the "peace and safety" of the United States.

The fourth branch was the most important, and by a paradoxical development it came by the end of the nineteenth century to attract a claim by the United States, enforced on several occasions, in any part of the American Continent subject to a threat of interference from a European Power, or wherever in such

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continent vital interests of the United States were endangered. Thus a doctrine originally directed against intervention was converted into a theory justifying intervention by the State which had first sponsored the doctrine. After the First World War, however, America's "good neighbour" policy towards other American States brought the Monroe Doctrine closer to its former objective of 1823. And now by the reason of recent inter-American regional security arrangements, it might seem as if the Monroe Doctrine regarded as an affirmation of the solidarity of the American Continent, has been transformed from a unilateral declaration into a collective understanding of the American powers.

Possibly, to this extent, the League of Nations Covenant in Article 21 may now be regarded as correct in referring to the doctrine as a "regional understanding". But the Monroe Doctrine has not been completely multilateralised To some extent, it still retains its unilateral significance for the United States Government, as indicated by the American "quarantine" or selective "blockade" of Cuba in Octobler, 1962. In order to forestall the further construction of, or reinforcement of missile bases on Cuban territory, and by the landing of United States units in the Dominion Republic in April, 1965, to protect American lives and to ensure that no Communist Government was established in the Republic.

Q. 31. Explain and illustrate the following :—

(a) Federal State and Confederation ;

(b) Condominium.

Consider the legal status of the above.

Ans. (a) Federal State and Confederation.—Under International Law confederation had no international personality The aim and objective of confederation is to establish a sort of co-ordination among the States, leaving States, independent in their internal and external matters. But under International law, these States are not international persons The confederation is generally formed by the merger of two or more than two sovereign states.

A Federal State is, however, a real State at International Law, the essential difference between it and the Confederation being that Federal organs have direct power not only over the member States, but over the citizens of these States. In most Federal States, external policy is conducted by the Federal Government but historically there have been exceptions to this rule. For example, the member States of pre-1914, Federal Germany were to some extent States at International Law : they could conclude treaties, appoint and receive envoys etc. and questions of law affecting their relations

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were decided according to law (See, for example, the case of *Lubeck* v. *Macklenburg Schwerin*) The States uniting under a Federation have their powers definad by the treaty or the constitution and they are sovereign with regard those powers while the Central Government which has its own organs is too free to exercise the powers allocated to it. The member States remain independent to each other. Federal State is an international person, for all intents and purposes. The principal Federal States now in existence are :—The United States of America, Switzerland, Mexico, Argentina, Canada, Germany, Venzuela, Australia, U. S. S. R. and India.

(b) Condominium.—A condominium exists, when over a particular territory joint dominion is exercised by two or more external Powers. An example is the New Hebrides. Both England and France exercise control over the territory of New Hebrides.

In a condominium, while the authority exercised over the population is a joint sovereignty, each of the jointly governing State has separate jurisdiction over its own respective subjects.

Q. 32. What is Commonwealth of Nations ? Discuss its legal status and its constituents with special reference to India.

Ans. Commonwealth of Nations.— Before 1948 the Commonwealth of Nations was called the British Commonwealth of Nations. This British Commonwealth of Nations was a group within the British Empire itself. The Imperial Conference of 1926 recognised the autonomy of some of the parts of British Empire which were to constitute the British Commonwealth of Nations. The report adopted at the conference described the members composing the Commonwealth thus :

"They are autonomous communities within the British Empire, equal in satus, in no way subordinate to one another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."

In 1948 the British Commonwealth of Nations was renamed as the Commonwealth of Nations.

Status of Commonwealth in International Law.—The Commonwealth of Nations is a loose association of independent States and does not fit in any legal classification of International entities. It is a class by itself. It is neither a Super State nor a Federation, but, simply an association of free and equal States, which operates primarily through these States, rather than by organic action. Although it is sought through periodical Prime Ministers Conferences to follow a common policy, deep differences of opinion

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are not excluded (as for example, in 1956, over Anglo-French intervention in the Suez Canal Zone). So far as India is concerned, she has made it clear that India is a sovereign democratic republic. India has joined Commonwelth of Nations on the basis of equality and the membership of Commonwealth of Nations. So far India is concerned it depends upon its sweet will and discretion.

Legal status of the Members of the Commonwealth.—The Members of the Commowealth are independent sovereign States and are international persons. They possess full Statehood and have rights and obligations under International Law. Their membership of the Commonwealth places, in the eye of law, no restrictions upon their sovereignty. They are not at all subordinate to the United Kingdom but enjoy equal status with it. They have a right to manage their own affairs, to formulate their own policies, to enact their laws, to negotiate and enter into international arrangements, send and receive diplomatic envoys, regulate their own affairs and to make war or peace with other States.

Q. 33. Discuss the International status of the following :—

(a) Bhutan.

(b) Sikkim.

(c) The Holy See or the 'Vatican City'.

Ans. (a) Bhutan.—The State of Bhutan is protectorate of the Government of India by virtue of the treaty concluded in 1949 It may be said to be a semi-independent sovereign State and in the matters of defence and foreign affairs, it has got treaty obligation with India. Bhutan enjoys complete international autonomy.

In 1971, Bhutan became a member of the U. N. O According to International Law, Bhutan is a State, but its sovereignty is limited so far as foreign and defence matters are concerned.

It may be noted here that Bhutan was the second country after India which recognised Bangla Desh. Recently the ruler of Bhutan, King Jigmewang Chuk called for 'updating' the 1949 treatey with India. He expressed his desire on 10th September, 1979 at Bombay after returning from non-aligned summit held in Cuba.

Sikkim.—By the Treaty of 1890 between great Britain and China the protectorate of the British Government over Sikkim was fully recognized. This position continued during the British rule in India. When India attained her independence, the British protection was removed. In 1950, a treaty between India and Sikkim was concluded and Sikkim became a protectorate of India. According to this treaty, Sikkim entrusted its external matters, defence and communication to India.

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But uow, 36th Amendment of the Indian Constitution has made it the Constituent unit of India.

(c) **The Holy See or the 'Vatican City.**—The Vatican City is the seat of the Pope and the smallest independent sovereign State in Europe. The people, called the Holy See, represents the Roman Catholic Church, and is recognized to have the right of sending envoys and of concluding treaties with other States. The Church is an order constituting a community which comprises the Chatholics of the whole world. The difference between the Church and the other States as international persons lies in the fact that no war can be waged against the Church and the Church cannot itself wage war against the other States.

The State of Vatican City covering an area of about 100 acres and having the population of about 700 came into existence as a result of the Lateran Treaty of 11th February, 1929, between Italy and the Holy See. The Pope is the Head of this State. This is a personal union between the Church and the State of Vatican City. The State of Vatican City has a territory while the Church has no territory but both are International Persons.

Q. 34 Differentiate between a Vassal State and Protectorate. Discuss the State of Tibet in International Law. (I.A.S. 1988).

Ans. Vassal State and Protectorate.—Those States, which while independent in the management of the internal affairs, are dependent upon the Suzerain State for the management of their external affairs, are known as Vassal States or States under suzerainty. The rights of a Suzerain State over the Vassal State are international rights. Suzerainty is not sovereignty but international guardianship. Unless deprived of all rights to have dealings with either full sovereign States under a treaty or an agreement, a Vassal State enjoys partial membership of the international community and has a limited international personality.

Rumania and Serbia were Vassal States before 1878 when by the decision of Congress of Berlin they attained full sovereignty. Bulgaria between 1878 and 1908, though under suzerainty enjoyed full membership of the community of Nations. The other important Vassal States were Egypt, the Transval, the Orange Free States, Tibet and Outer Mangolia. A protectorate, however, is a relationship between a weak and strong State and is established by a treaty. When a weak State places itself under the protection of a stronger State for the management of the foreign affairs, while retaining its independence with regard to its domestic affairs, a protectorate is established. The distinction between a Vassal State and State under a protectorate lies in the fact that the protected State under a treaty retains some of its international person-

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ality. The heads of the protected States enjoy immunities. The protected State not being a part of the superior protecting State is not necessarily a party in a war waged by the protectorate, a weak State voluntarily surrenders a part of its sovereignty while in the case of a vassalage, the suzerain State gives some autonomy by way of concession. The two European Protectorates are the Republic of Ardora and the Republic of San Marino.

Status of Tibet.—Tibet occupies a peculiar position ; it had been for centuries a Vassal State under the suzerainty of China. The control which China exercised over Tibet was nominal. In 1911 when China came into the grip of political revolution it lost all control over Tibet which asserted its full independence. To the foreign States, its position was that of an autonomous State under the suzerainty of China. The effective control of China over the external affairs of Tibet was rendered possible by the Sino-India Treaty of 1951 which provided for the establishment of a Chinese Military and Administrative Commission in Tibet. The position of Tibet today is that of a State which is under the real suzerainty of China. The recent disturbances have however, made the legal status of Tibet a matter of international controversy.

It may be noted here that China flagrantly violated the treaty of 1951, and started interfering in the internal affairs of Tibet. In 1959, the situation deteriorated so much that the conflict took the form of a war between China and Tibet, China sent its forces in Tibet and ruthlessly suppressed the movement of People. Dalai Lama the spiritual Head of Tibet was compelled to leave Tibet. He fled away from Tibet and took asylum in India. Thus policy of China has converted it into a vassal state and the rights of citizens of Tibet are flagrantly violated and Tibetians are at the mercy of government of China.

35. Neutralized States are part sovereign only and not international persons occupying the same position as other States". Write critical note on this statement. (I.A.S. 1973).

Ans. Neutralized State.—"A neutralized State is a State whose independence and integrity are for all future time guaranteed by an international convention of the powers under the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international obligations as could indirectly involve it into war [*Oppenheim's International Law*, Vol. 1 (VII Ed.), p. 219].

Starke, lists the following obligations of the neutralized nations—

(i) not to engage in war except in self-defence ;

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(ii) they will not enter into a military pact or agreement with other States.

The neutralization of a State is thus result of an international agreement whereby the Great Powers agree to accept the status of the neutral State and the neutral State undertakes to refrain from war except in self-defence and from entering into agreements which may involve it indirectly into a war. A State cannot attain the position of a neutralized State by simply declaring itself to be neutral without entering into an international agreement with the Great powers. It is an international treaty concluded between the Great Powers and the neutral State that confers the status of permanetly neutralized State.

Therefore, the distinction between a neutralized State and other States lies in the fact that while a neutralized State cannot wage war except on certain grounds, nor can a war be waged against it, there is no such restriction placed on other States. The restriction against acquisition or cession, which is placed on neutralized States, do not apply in respect of other States.

Neutralization differs fundamentally from neutrality which is a voluntary policy assumed temporarily in regard to a state of war affecting other powers, and terminable at any time by the State declaring its neutrality. Neutralization, on the other hand, is a permanet status conferred by agreement with the interested power, without whose consent it cannot be relinquished. It is thus also essentially different from neutralism, a newly coined word denoting the policy of State not to involve itself in any conflicts or defensive alliances. [*Oppenheim's International Law*, Vol. 1 (VIII-Ed.), p. 219].

A State does not lose its international personality by neutralization. A neutralized State remains a full sovereign power and cannot under the law be regarded to have lost its independence. Switzerland, Belgium and Austria furnish the outstanding examples of neutralized States. [*Starke on International Law*, p. 101].

Switzerland—Switzerland has for a long time followed the policy of a neutrality. It became permanently neutralized in 1815, when at the Congress of Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden and Russia signed a declaration whereby the neutrality of Switzerland was recognized. This neutralization of Switzerland was again recognized by the Powers at Paris in November, 1815, after the defeat of Napolean. Since then Switzerland has maintained its neutrality. The League of Nations also recognized its status as a neutral State by admitting it as an original member on an understanding that she "shall not be forced to participate in a military action or to permit the passage

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of foreign troops or the territory." In November, 1977 it has applied for the membership of U.N.O.

CHAPTER VIII

PLACE OF INDIVIDUAL IN INTERNATIONAL LAW

Q. 36. To what extent is it true to say that the individual is a subject of International Law ?

Or

How for an individual is subject of International Law ?

Discuss briefly with special reference to some of the war-crime trials.

Or

Discuss briefly the position of the individual in relation to International Law and state the arguments for and against the view that individual citizens of various States are only objects but not subjects of International Law.

Or

Do you agree with the view of Kelsen that "in the ultimate analysis, individuals alone are the subjects of International Law" ? Assign reasons for your answer. (I.A.S. 1965).

Or

(a) 'The duties and rights of States are only the duties and rights of men who compose them'. Discuss fully this statement, with special reference to the subjects of International Law. (I.A.S. 1969).

(b) What is the place of individual in the Soviet Republic ?

A. (a) Individual in International Law.—There is a sharp controversy as to the right position of an individual in the scheme of modern International Law and it would be interesting to note the views of great writers on the subject. In the beginning they, that is individuals were accepted as subject of International Law as an exception to the general rule and number of jurists treated them as object rather than the subjects of International Law. This view has now been discarded so.

Oppenheim —Oppenheim held that individual human beings were not subjects of International Law. He maintained that States alone were subjects of International Law.

Lauterpacht.—Lauterpacht, who revised Oppenheim's book on

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International Law does not, however, share the view held by Oppenheim.

Westlake.—Westlake while emphasizing that States were primarily subjects of International Law did not overlook the importance of individual human beings in the scheme of international affair. Speaking of the importance of the individual in International Law he stated thus : "The duties and rights of States are the only duties and rights of the men who compose them."

E. A. Estowell.—Stowell while maintaining an individual as the subject of International Law both in his capacity of a human being and as being a component part of the State has observed that, "Fundamentally the law of nations is a law of individuals enforced through the agency of the Government of the communities into which mankind is apportioned."

Hans Kelsen.—According to Kelsen, "Like all law, International Law, too is a regulation of human conduct. It is to men that norms of International Law apply.

Danzing Railway Official Case (1928) P. C. I. J. Ser, B. No. 15.—It was authoritatively decided by the Permanent Court of International Justice in this case that if by a particular treaty the parties intended to confer right on individuals, then these rights should receive recognition and effect of International Law, that is to say, from an International Court.

International Law as applicable to individual.—International Law in various ways regulates the conduct of an individual, which can well be seen as below :—

1. **Piracy.**—International Law prohibits piracy and imposes an obligation on all States to seize pirates on the high seas and to punish them.

2. **Abuse of flag.**—International Law requires ships to sail under the flag of a State and imposes an obligation on a State having maritime flag to lay down conditions to be fulfilled by vessels which are to be under its flag.

3. **Injurious acts of individuals.**—There are numerous rules of International Law, which require States to punish individuals guilty of committing acts injurious to foreign States, for example, heads of States and diplomatic envoys while in a foreign State enjoy special protection of their person and International Law requires that an individual who commits any violence against their person must be severely punished (*Republican* v. *De Longchamps*).

4. **Aliens.**—International Law concedes rights to and imposes obligations upon individuals, present on the territory of a foreign

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State. Every State is compelled to grant to aliens equality before the law with its citizens so far as safety of person and property is concerned.

5. War crimes and acts of illegitimate warfare.—According to *Oppenheim*, the entire law of war is based on the assumption that its commands are binding not only upon States but their nationals whether members of armed forces or not. This principle guided the Powers in arriving at the Agreement of August 8, 1945, for the punishment of major war criminals of the European Axis on the basis of individual responsibility for crimes. On the objection that individuals could not be held responsible, the Neuremberg International Tribunal observed :

"Crimes against International Law are committed by men, not by abstract entities, and only by punishing individual who commit such crimes can the provisions of International Law be enforced." Tokyo Trial furnishes another example of the responsibility of individuals for war crimes.

6. Breaking of blockade and carriage of contraband.—The rules of International Law authorize belligerent to capture neutral vessels committing breach of the blockade or carrying contraband and to confiscate them through decision of their prize courts.

7. Espionage.—International Law authorizes a State to punish a spy even if he committed the crime of espionage at the command of the enemy State.

8. The Treaty of Versailles (1919).—This is one of those treaties which confer rights on individuals also. Article 297 of the Treaty of Versailles permitted a private individual to bring an action against Germany before mixed arbitral tribunal constituted under Article 304 of the Treaty for recovery of damages suffered by him on account of the extraordinary war measures taken by Germany during the first World War.

9. The German Polish Convention.—The Convention concerning Upper Silessia of 1922, conferred a right on individuals. It authorized a private individual to file a suit against the State before an international court for violation of interest protected by the Convention.

10. United Nations and the individual.—The charter of the United Nations expresses "the determination of the Peoples of the United Nations to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." It was in pursuance of these ideals that the United Nations adopted some important measures. The United Nations' General Assembly adopted a Genocide Convention on

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December 9, 1948, attaching direct responsibility to individuals. Under the Convention, the States parties agreed that genocide and the conspiracy or incitement to commit genocide and attempts and complicity therein, should be punishable on trial by national courts or by an international criminal tribunal. The adoption of the Universal Declaration of Human Rights on December 10, 1948 is a further landmark in the victory of the individual in International affairs.

These and other developments in the modern world clarify that the States are not only the subject of International Law but now individual and International organisations are also the subject of international law.

(b) Individual in Soviet Republic.—The attitude of U.S.S.R. in regard to the place of individual in International Law has been one of professed antagonism. *Mr. V. Koretesk* of Russia in his capacity as jurist in the United Nations International Commission unequivocally declared that he did not agree with the concept of individuals as "subject of International Law." It is because Communism starts with the negation of individualism. Such a provision in International Law will not allow them to perpetuate their totalitarianism hence this opposition.

Thus it is clear from the above discussion that today International Law regulate the conduct and relations of not only State but also of individuals ; international organization and certain other non-State entities.

Q. 37 (a) "The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December, 1948. has been hailed as a historical event of profound significance and one of the greatest achievement of the United Nations" (Lauterpacht). Discuss the proposition by referring to some rights you consider important.

(b) Is it a legal instrument ? If not, wherein does its strength lie ? (I.A. S. 1951).

A. (a) Universal Declaration of Human Rights.—In 1948, the United Nations issued the declaration of Human Rights which has unique importance in that these rights if respected by States shall promote international amity and remove chances of international conflicts. The adoption of this Declaration makes the victory of individual in international affairs. The preamble of the Declaration states : "The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people and all nations to the end that every organ of the society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms

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and by progressive measures, national and international, to secure their universal and effective recognition and observance both among the peoples of the member States themselves and among the peoples of territories under their jurisdiction "

Provisions of the Declaration.—Declaration contains thirty articles which set forth the inalienable rights of man. *The first two articles* lay down that all human beings are born free and equal in dignity and rights and that every individual human being is entitled to all the rights and freedoms without distinction of any kind, such as, race, colour, sex, language, religion, political or other opinion, national or racial, origin, property, birth or other status.

The Universal Declaration of Human Rights makes a decisive step towards the fulfilment of one of the important purposes of the United Nations. The Declaration offers a guarantee to individuals buth at home and abroad in respect of all the rights it enumerates and serves as a strong link between the individual and International Law. Its great importance lies in the fact that it has a new common standard of achievement for all people and all nations It can be safely stated that the Declaration is "an international Magna Charta of all men everywhere, comparable to the Declaration of rights of man by the French people in 1789, and the adoption of the Bill of rights of the People of the United States. It ought to be the ringing words that go out over the world."

(b) Legal nature of the Declaration.—The adoption of the Universal Declaration of Human Rights was followed by numerous comments on its legal nature and its binding force. It was said that the Declaration was neither a treaty nor an international agreement and that it had no binding force on the Member States of the United Nations. The United States representative did not consider it to be a legal document. The Indian delegate was of the view that, although the document was not legally binding, it would have a certain amount of force and might help to dispel pessimism and disillusionment and to relieve the tension of the present world situation. The case of Bangla Desh was the most glaring example of the gross violation of human rights and preparation of crime of genocide. It ceased to be a matter of domestic jurisdiction and the U. N. could intervene on humanitation grounds.

Prior to the Charter, apart from the precarious doctrine of humanitarian intervention, International Law considered the matters to be within the exclusive domestic jurisdiction of the State.

Moral force of the Declaration.—The British delegate subscribed to the view that the document enjoyed moral authority, which would serve a guide to the Governments in their efforts to

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guarantee human rights by legislation Belgian delegate Professor Dehouse also adhered to this view and remarked that in the Declaration there is a moral value and authority which is without procedence in the history of the world, and there is a beginning of the system of International Law. But as says *Lauterpacht*, the moral authority of the declaration is impaired by the fact that some of its crucial provisions are couched in language which is calculated to mislead and which is vividly reminiscent of international instruments in which an ingenious and deceptive form of words serve the purpose of concealing the determination of a State to retain full freedom of action.

Whenever, specific cases of violation of human rights arise, concerned States take the plea of domestic jurisdiction The most recent example of this is the alleged violations of human rights by socialist countries, particularly Soviet Union's treatment of dissidents. (V. Yavoslavtsev, "Non Interference. A basis Principle, Newstimes vol. 20 (May, 1977) at pp. 18 and 19) 'Consequently' says *Starke*, "the declaration could not and did not purport to be more than a manifesto, statement of ideals a "path finding" instrument. To that extent it has achieved as much as could be expected. Its most important contribution lies in the pioneering definition in thirty articles of the scope of each human right. To reproach the Declaration for the absence of provision of enforement machinery or for the fact that it is not a bidding instrument is to misconstrue its original limited purpose to provide a generally acceptable catalogue of man's inalienable 'right'. [*Starke's International Law (40th Ed.)* p. 29].

CHAPTER IX

STATE RESPONSIBILITY AND INTERNATIONAL TORTS

Q 38. "State responsibility concerning International duties is therefore a legal responsibility"—Oppenheim.

Elucidate the above statement and discuss briefly the nature and extent of such responsibility.

A. Responsibility of States.—States, as International persons, have duties to perform with respect to other States and their citizens. These are International duties and neglection of international duties constitutes an international delinquency Dealing with the nature of the State's responsibility *Oppenheim* observes : "It is often maintained that a State, as a Sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of State towards its subjects. Since a State can abolish parts of its Municipal law, it always, avoids legal, although

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not moral, responsibility by a change of Municipal law. Different from this internal supremacy is the external responsibility of a State to fulfil its International legal duties. Responsibility for such duties is a quality of every State, an International person, without which the family of Nations could not peaceably exist. *State responsibility concerning international duties is therefore a legal responsibility*. For a State cannot abolish or create International Law in the same way that it can abolish or create Municipal law. Every neglect of an international legal duty constitutes an international delinquency and the injured State can subject to its obligations of pacific settlement through reprisals or even war, compel the delinquent State to fulfil its international duties."

The law of State responsibility is on developing stage. Starke remarks, "The law of State responsibility is still in evolution and may possibily advance to the stage where States are fixed also with responsibility for breaches of International law and International crime." According to the Hague Convention, 1907, if a belligerent State disregards the rules of war, it shall pay compensation. The object of the work of the Twenty-fifth Session of the U. N. International Law Commission is also to codify the law relating to the State responsibility.

The Twenty-eighth Session of the Commission which was held at Geneva from May 3 to July 23, 1977 dealt with the objective element of the wrongful act. The Commission emphasised the need of making distinction between different categories of internationally wrongful acts. Such a distinction is recorded by the provision of Article 19 which is as follows :—

1. An act of State, which constitutes a breach of International obligation is an internationally wrongful act.

2. Internationally wrongful act which results from the breach by a State of an International obligation i. e, a breach of obligation imposed on the State, which results in crime.

3. Any intentional wrongful act which is not an international crime in accordance with the paragraph 2 constitutes an international delict.

Original and Vicarious Responsibility.—The responsibility of the State for the actions of its Government is original responsibility. The responsibility of the States of certain unauthorised actions of its agents or their subjects is known as vicarious responsibility. This vicarious responsibility is imposed upon a State by International Law. The original responsibility is more serious than the vicarious responsibility for the former arises out of the acts done by itself while later is imposed upon it for certain internationally injurious acts committed by its officials, subjects and such aliens as are

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temporarily residing on its territory. The State is liable to pay compensation for injurious acts done by its Government or its agent while in the case of vicarious responsibility, the State is bound to compel the persons who have committed unauthorised injurious acts to repair the wrong doer or to punish the wrong doers. The vicarious responsibility of a State is liable to turn into original responsibility if the State fails to compel the wrong doer to repair wrong-done or, if necessary to punish the wrong-doer. It is to be noted that the legal consequences of the act may not be same but there is no fundamental difference between the two categories and in any case use of "vicarious responsibility here is surely erroneous.

International delinquency.—An international delinquency implies breach of some duty imposed upon a State by International Law and which is not the breach of a purely contractual obligation. All those who have an international duty to perform can be guilty of international delinquency. A full sovereign State or even a semi-sovereign State which occupies a position in International Law have international duties imposed upon them and both can be a subject of international delinquency. The act of the members of the Government or other agents of the Government so long as they are performed in official capacity and the result is in breach of duty imposed by International Law amounts to international delinquencies : Not only a State but individuals who have international duties to perform are subjects of international delinquencies. The international delinquency differs from the international crime. The international delinquency is remedied by the payment of the compensation but the remedy for international crime may be the punishment or reparation The tribunal in the noted Nuremberg Trial observed, ' Crimes against International Law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can, the provisions of international Law, be enforced". [I. A. S. 1968 ; 1962 P.C.S. 1966.]

"In the subject of international delinquencies" as pointed out by *Starke* "it is important to apply the notion of imputability which depends on the satisfaction of (a) conduct of a State organ or official in breach of an obligation defined in a rule of international Law ; (b) the attribution of the State in conformity with international Law, of this breach of international obligations. It is only if the breach is imputable that the State becomes internationally responsible for the delinquency. Thus to take an example, if an agency of State *X* has caused injury to a citizen of State *Y* in breach of International Law, the conduct in breach of International Law is imputed from the organ or official to the State. Responsibility begins where imputability ends". According to Brierly, the State is liable only for its own delinquencies which means, since the State itself is

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an abstraction such injurious acts or omissions of authorities of the State as International Law, on principles of which the main outlines atleast are well settled, attributes to the State itself."

Reference may be made here to Youman's case. In this case, the mayor of the town (in Mexico) ordered a Lieutenant of State forces to suppress riots and attack against certain Americans, instead of dispersing the rioters the troops did just the reverse. They started firing on the house in which the Americans had taken refuge. In the process, one American was killed. The two others were forced to leave the house and were killed by the troops and the rioters.

State responsibility in respect of resident aliens. [P. C. S 1972] —An alien is entitled to enjoy all those rights which the laws of the State allow him and the State is responsible to protect those rights of his in the same manner as it protects similar rights of its citizens. This responsibility of the State is based on the "equality of treatment". It is affirmed by certain writers that there exists an international standard of justice and if a State does not maintain the minimum standard of international justice with the result that an alien fails to get such protection as is expected of a civilized State, the State renders itself answerable to the foreign State of which the alien is subject. The theory is supported by U. K., U. S. A and also by decisions of International tribunals.

In oppening the fire against the Americans the troops had disobeyed the orders of the Mayor and had acted beyond the scope of their authority. The Mexican Government was held liable for the wrongful acts of the troops

The responsibility of a State may arise in one or more of the following ways :

(a) State responsibility with regard to the acts of individuals.— If an individual causes a civil injury to an alien by his wrongful act, the injured alien has a right to claim redress of that wrong in all those ways as are provided by the law of the State where he is present. The alien is bound by the final decision of the courts of that State in the same way as its citizen is. But, if the final decision of the Municipal Courts is so perverse, arbitrary or discriminatory as to amount to denial of justice, the State of which the alien is a subject may take up the matter diplomatically to be decided on principles of International Law. The denial of justice as defined by the *Harward Research Draft* exists when there is unwarranted delay or obstruction of access to courts, deficiency in the administration of justice or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or manifestly unjust judgment. An error

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of a native court which does not produce manifest injustice is not a denial of justice.

If the alien becomes a victim of the criminal act of an individual the State is responsible to afford redress.

(b) State responsibility for acts of insurgents.—If the State has failed to exercise due diligence in preventing violence of the mob and an alien is injured, the State is responsible.

(c) State responsibility for mob-violence.—Generally, State may be responsible for mob-violence only when it has not made due diligence to prevent it. Out-breaks of war or mob-violence resulting in injury to the aliens raise regularly the question of prevention as well as of redress. While occasional out-breaks of mob-violence may be accepted in any States and their mere occurrence is not itself a ground of responsibility, the State is expected to use, due diligence to prevent them. But this test is very uncertain and ambiguous. 'Due diligence' to prevent mob-violence depends upon the time, facts and circumstances.

Calvo Doctrine—*Calvo Doctrine* lays down that State is not responsible for losses suffered by aliens at the hands of its insurgents. The doctrine in such an absolute form has, however, not been accepted by a member of State including the United States and Great Britain. The attitude of those States is that a State is not responsible for losses suffered by aliens at the hands of its insurgents unless there has been negligence on the part of the State in suppressing the insurrection or lack of due diligence in preventing the particular acts which caused the loss to aliens.

(d) Responsibility of a State for acts of its Governmental organs.—The State is directly responsible for the acts of its heads or its highest executive officer on the administrative side, if those acts cause injury to the alien. With regard to the acts of the subordinate executive officers, the State is responsible only when the act complained of was done by him within the scope of his general authority. This responsibility arises when the remedies provided by law have been exhausted and the State fails to punish the subordinate official, if required to be punished under these circumstances by the law in that behalf. A State is responsible for its legislative acts also. The act of judicial organs of a State also fasten responsibility on a State of International Law. The State is responsible only when the decision of its court is manifestly unjust.

(e) State responsibility with regard to contractual relation of aliens—The practice of State shows that there is no general responsibility of a State for breach of contracts which aliens entered into with its Government. The aliens aggrieved by the breach of contract are free to have their remedy which the law of the State

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have provided in that behalf. State responsibility for breach of such obligation depends upon the provision of the contract generally. If a State contracts with the citizens of another State then generally State owes no responsibility in case of breach of contract but if any contract entered into with another States that it will enforce the contract entered into with the citizens of that State, then there will be State responsibility in consequence of the breach of contract with the citizens (*Anglo-Iranian Oil Co. case*, ICJ Rep. (1952) p. 93.

(f) State responsibility in respect of expropriation of foreign property.—The expropriation of the foreign property is valid only when there is no irregularity or discrimination with the foreigners In 1962, the Economic and Social Commission passed a resolution which provides that in the case of expropriation, nationalisation or requisitioning the owner shall be given compensation in accordance with the rules inforce in States. On December 13, 1974, the U. N. General Assembly also passed the resolution giving the power to the State to expropriate the foreign property subject to the payment of the compensation. (See also Question No. 51).

(g) Liability for the deeds of Transnational or Multinational Corporation —International Law lacks definite provisions for the liability of multinational or transnational Corporations. General Assembly (U. N O) adopted the charter of Economic Rights and Duties, on 12th December 1974, and recognised the right of each State to regulate and supervise the activities of transnational Corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. But this proposal was voted against by the developed countries such as U. S. A., U. K., Federal Republic of Germany and Japan.

Indian View.—In *M. C. Mehta's case*, S. C. of India (AIR 1987 SC 965) held that enterprise (any, whether national or multinational) must be under an obligation to provide that hazarduous or inherently hazarduous activity must be conducted with the highest standard of safety and if harm results on account of such activity of enterprise he must be absolutely liable. On the basis of this principle Bhopal gas leak disaster case (Union Carbide) was decided.

Q. 38 Explain the notion of the responsibility of a State for international delinquencies and the remedies thereof. What is the effect of the Calvo Clause ? (I. A. S 1968).

A. In fact, generally cases of State responsibility arise out of wrongs alleged to have been committed by the concerning State. Word "wrong" means breach of some duty which rests on a State at International Law and which is not a breach of a purely contractual obligation. In the language of International Law such wrongs

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are termed as "international delinquency". Commonly the cases which come under the term "international delinquency" concern injuries that may be suffered by citizens abroad. Such injuries may be of different kinds, for example, injuries to property in the course of riots, personal injuries, improper arrests by the local authorities, the refusal of local judicial tribunals to accord justice or due redress, and so on. Generally speaking, a person who goes to live in the territory of a foreign State must submit to its laws, but that is not to say that certain duties under International Law in respect to the treatment of that person do not bind the State. Examples are the duty on the State to provide proper judicial remedies for damages suffered, and the duty to protect alien citizens from gratuitous personal injuries by its official or subjects.

In the subject of international delinquencies, it is important to apply the notion of imputability. This notion assists in classifying the subject and in providing a proper frame work for its theory. To take a practical example, if an agency of State '*A*' has caused injury to a citizen of State '*B*' in breach of international law, technically we say that State '*A*' will be responsible to State '*B*' for the injury done. What this means is that the organ or official of State '*A*' has committed a wrongful act, and the conduct in breach of International Law is imputed from the organ of official to the State.

In *Orinoco Steamship Co.* [(1903) Ralston International Arbitral Law and Procedure, p. 72], case the Calvo clause was upheld. But on its reference to the Permanent Court of Arbitration at the instance of the U S , it was held that the rejection of the claim by the umpire was not justified. [See 1910 Scot Hague Court Reports p. 226 ff].

The rules of State responsibility depend on keeping a proper balance between two fundamental rights of State :

(i) the right of a State to exercise jurisdiction within its own territory, free from control by other State ;

(ii) the right of a State to protect its citizens abroad.

The Argentinian jurist Calvo, in his treatise on International Law has laid down the doctrine that a State could not accept responsibility for losses suffered by foreigners as a result of insurrection for such responsibility would place weaker State at the mercy of the stronger States.

The Calvo clauses have been namad after Argentinian jurist Calvo and these clauses are frequently inserted in contracts between Central and South American Governments and foreign companies

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or persons to whom concession or other rights are granted under the contracts.

The object of such clause is to ensure that legal disputes arising out of the contract shall be referred to the Municipal courts of the State granting the concession or other rights, and to oust the jurisdiction of international arbitral tribunals or to prevent any appeal for diplomatic action to the national State of the company or individual enjoying the concession.

Perhaps the better opinion as to the Calvo clause may be summed up as follows :—

1. In so far as such clause attempts to waive, in general the sovereign right of a State or protect its citizens—it is to that extent void.

2. It would he obviously improper for the individual to treat the State against which he seeks redress as an inferior and untrustworthy country, and to apply for his Government's intervention without making any claim in the local courts.

3. Where such a stipulation purports to bind the claimant's Government not to intervene in respect of a clear violation of International Law, it is void.

Thus the Calvo clause is inffective to bar the right of States to protect their nationals abroad, or release the States from their duty to protect foreigners on their territory.

INTERNATIONAL TORTS

Q. 39. What do you understand by International Torts ? Write a short essay on International Torts and damages discussing the various considerations involved in fixing tortious liability in International Law.

Ans. International Torts.—Rules on international responsibility form a vital complement to all other rules of International Law. According to Prof. Schwarzenberger, the basic rules in this field can be formulated in two apparently straight-forward propositions :

1. The breach of any international obligation constitutes an illegal act or international tort.

2. The commission of an international tort involves the duty to make reparation *i.e.*, the essential for the protection of fundamental interests of the international community, that its breach is recognized as a crime by that community, as a whole, constitute an international crime.

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In the judgment on the Chorzov Factory (jurisdiction 1927), the World Court held :

"It is a principle of International Law that breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable compliment to a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations which may be due by reason of the failure to apply a convention, are consequently differences relating to its application".

Tortious liability in International Law arises *ex lege*, i. e., independent of the will of any particular subject of International Law.

Forfeiture of claims by Acquiescence (Extinctive prescription).—Like any other rules of customary International Law, the rules governing international torts may be modified by consent or acquiescence. Consent or acquiescence may lead to the waiver of any particular claim which a subject of International Law would otherwise be entitled to make. This situation is somewhat analogous to the principle expressed in the maxim *volenti non fit injuria.* Prolonged inactivity in circumstances in which silence must be interpreted as abandonment of claim may result in the extinction of International claim.

Meaning of International Tort.—According to Prof. Schwarzenberger, any unjustified, uncondoned, imputable and voluntary breach of an international obligation amounts to an international tort. The term 'international tort' as applied to the breach of any international obligation underlines that International Law does not know of any closed list of torts. In the *Union Bridge Company Claim* (1924) between Great Britain and the United States of America, the Tribunal established that contrary to Great Britain's obligation to protect neutral property, British officials in South Africa had interfered unlawfully with property of this United States company. This act amounted to an 'international tort' the issue between the parties had to be decided not by reference to distinctions between trover, trespass and action on the case, but by reference to the broad and well-recognized principle of International Law which gives, what in all the circumstances, is a fair compensation for the wrong suffered by the neutral owner.

Thus, the breach of any international obligation whether it rests on a treaty, a rule of customary international law or a general principle of law recognized by civilized nations constitutes an international tort. Further, a serious breach of international obligation of essential importance for safeguarding the preservation of human environment.

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Legal interest of the claimant.—The legal interest of the claimant can only arise if two conditions are satisfied, *viz.*, (*1*) *Nationality of the claim and* (*2*) *Exhaustion of local remedies.*

(1) Nationality of the claim.—One of the necessary conditions of presenting an international claim is that there should be a bond of nationality between the claimant State and the person injured [*Paneyvezaz* v. *Sardustikis Railway* case, Series A/B No. 76, p. 16]. This bond of nationality must not only exist at the date of the original injury but also continue until the date of the judgment or award. If by death or by assignment, the beneficial interest in the claim has passed from the person originally injured to a person of different nationality, the right to bring an international claim will lapse. In principle, International Law leaves it to each State to settle by its own laws determining the persons whom it considers to be its nationals. The International court, however, has laid down in *Nattebohm* case (I. C. J. Reports, 1955, p. 23), that the provisions of a State's Municipal laws are not conducive to establish its right to exercise diplomatic protection under International Law, if the bond of nationality between the person injured and the claimant State is not a real and effective one.

The rule, however, is subject to certain exceptions in which a right to exercise diplomatic protections of non-nationals is recognized on the basis that the persons concerned are to be assimilated a nationals, *e.g.*, (i) inhabitants of a protected State, (ii) aliens serving on the merchant ships or in the armed forces of the claimant State, (iii) by treaties. Like any other rule of International Customary Law the rule on the nationality of the claims may be modified or abrogated by means of treaties.

(2) The Exhaustion of Local Remedies.—Another condition of an international claim for the redress of an injury suffered by an alien is that the alien should have first exhausted any remedies available to him under the local law, in the *Amberitclos' case* (1956), the local remedies rule was formulated as follows : "The State against which an international claim is brought for injuries suffered by a private individual has the right to resist such an action, if the persons alleged to have been injured, have not first exhausted all the remedies available to them under the Municipal Law of that State." The local remedies which must be exhausted include administrative remedies of a legal nature but not extra legal ramedy or remedies as of grace (*Finish Vessels Arbitration*, (1934) 3 R. I. A. A., p. 1479].

The local remedies rule, however, is not absolute but subject to some exceptions :

(a) Lack of any effective local remedies.—If a State lacks the

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organisation required by the minimum standard of international law, this by itself amounts to a breach of an international obligation. For such a State to insist on compliance with the local remedies rule would run counter not only to common-sense but also to good faith. If the local tribunals are notoriously corrupt or notoriously discriminate against foreigners, the individual is not required to exhaust justice when there is no justice to exhaust. [*Robert D. Brown*, (1923) R. I. A. A. Vol. 6, p. 120].

Again, if the wrong has been committed by the Legislature itself or by some high official, but State responsibility is accepted only to the extent where the officials concerned have acted beyond their power and jurisdiction. Similarly, State is responsible for the acts of its judicial organs.

(b) Waiver.—The defandant State may waive right to rely on the exhaustion of local remedies rule as any other right under International Customary Law.

Identity of the Tortfeasor.—Another requirement of an international tort is that act or omission must be attributable to an international person. First, let us see how far the States, the typical subject of international law are responsible for the tortiously relevant acts and omissions of its various organs.

Legislature.—Acts of the national legislature are the acts of the State itself since the legislature is its law-making body. Here the responsibility of the State is direct and immediate. "It is a settled principle of International Law that a sovereign cannot be permitted to set up one of its own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject". [*Schufede Claim*, (1930) between Guetamala and U. I. A., 2 R. I. A. A. L. 1079].

The Executive.—A State incurs no responsibility for an injury suffered by an alien unless some fault either of commission or omission can be attributed to itself. It follows that it is not responsible for an injury which results from the act of a private individual. In determining the imputability of an illegal act to executive organs, international judicial practice has tended to avoid each of the two extremes. In steering a middle course, international tribunals had to evolve some kind of dividing line between acts which are attributable and others which are not subjects of international law—*Schwarzenberger*.

In the *Massey Claim* (1927) and *Way Claim* (1928), two relevant factors were singled out, the character of both the alleged illegal act and the public office occupied by the individual concerned. These two factors form the basis of the notion of imputability. It is only if the breach is imputable that the State becomes interna-

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tionally responsible for delinquency. As pointed out by Brierly "the State.....is liable only for its own delinquencies. Thus it has been beld that participation in a murder by soldier on duty in the presence and under the immediate supervision of a commanding officer is a public act and so the Government was responsible. [*Youmans claim* (1956) between Mexico and U S. A.] The reckless use of fire-arms by troops on guard [*Stephen's claim* (1927) or patrol (*Kling claim* (1930)] duties appear to fall clearly into the same category.

Lastly, a State cwes higher responsibility for the acts of its superior officials than those of its subordinates. In this regard Professor Friedmann in his book, "Law in a Changing Society" (1970, p. 337) has pointed out :

Professor Friedmann in his book, "Law in a Changing Society" (1970, p. 337) has pointed out :

"The traditional doctrine of international Law, which restricts State responsibility to persons officially connected with Government, as distinct from private persons, is predicted on the assumption that the latter are free from Government direction or control in the action affecting foreign States."

Judiciary.—State responsibility with regard to the acts of its judicial organs, though in principle is the same as that of its other organs, in practice however it is considerably circumscribed in view of the fact that judiciary should be allowed maximum of independence for the proper discharge of its function. International responsibility of States for judiciary has been limited to "exorbitant cases of judicial injustice".

Revolutionaries.—The revolutionaries whether successful or unsuccessful aim at the overthrow of an established political or social order by force. What is relevant is whether the revolutionaries have been successful in their object. "Success makes illegal acts of revolutionaries imputable to the State. Failure leaves them in the orbit of Municipal law." Thus, so far as the State responsibility for the acts of revolutionaries is concerned the general rule is that it is the responsibility of the State to try to prevent the isolent acts of revolutionaries. But there is a controversy that if the States are not able to prevent violent activities, whether they will be responsible or not.

So when there is a revolution or put it more precisely insurrection there is a presumption that the State shall make due diligence to prevent it because it is in the interest of the State to suppress it.

Successful Revolutionaries.—Once revolutionaries are success-

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ful, they themselves are the Government. From there onward all illegal acts and omissions of the revolutionaries are imputable to the new Government. The imputablility of illegal acts and omissions of the revolutionaries to their State operate with retrospective effect Further the revolutionaries are also liable for the tort of their "legitimate" and defeated opponents. It has also been held that successful revolutionaries are not only retrospectively liable for their own torts but also for those of the former 'legitimate' Government. [*Pinson Claim*, (1928) 5 R.I.A.A., 327 at p. 430].

Unsuccessful Revolutionaries.—The acts of unsuccessful revolutionaries are not imputable to the State. A State is responsible for the illegal acts and omissionss of its own and only its own organs. Those of the individuals who aim at its overthrow cannot be attributed to the State In Home Missionary Society case (1920) it was held that "no Government can be held responsible for the act of rebellious bodies of men committed in violation of breach of its authority, unless it is itself guilty of good faith or of negligence in suppressing insurrection." Whether the acts are acts of banditry, mob violence or revolution, the minimum standard of international Law requires that a State should not be entirely devoid of resolve to attain its primary purpose, i.e., the maintenance of International peace and social order. If foreigners alone are victimized by riots or revolutionary excesses or if discrimination shown in granting protection to foreigners or nationals of any particular power, this will substantiate the proof of failure of a State to fulfil its own duties effectively under the minimum standard.

Individuals.—A State is not responsible for the acts or omission of its individuals unless it associates itself expressly or tacitly with them. In *James Claim* (1926) in which an American Superintendent of Mines in Mexico was murdered by a discharged employee, compenstation was awarded to the widow on the ground that the local authorities failed to apprehend and punish the murderer under circumstances in which the negligence might be said to have amounted to indifference to the commission of the crime. The Claims Commission observed : "The culprit is liable for having killed or murdered an American national ; the Government is liable for not having measured up to its duty diligently prosecuting and properly punishing the offender."

In *Neer's* case, (1927) in which an American Superintendent of mines was killed by a body of armed men, compensation was refused on the ground that the Mexican authorities had not shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as to render Mexico liable in the case.

Requirement of fault.—"An unjustified, uncondoned. imputable

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and voluntary breach of an International obligation amounts to an International tort". The question that immediately crops up in our mind is whether an element of fault such as, wrongful intent, malice, negligence or at least knowledge of the wrong is essential to give rise to tortious liability in International Law. Those who favour the requirement of fault hold that a State is not responsible to another State for unlawful acts committed by its agents unless such acts are committed wilfully and maliciously or with culpable negligence. It is difficult to subscribe to such a view. Wilfulness or malice may be necessary to constitute an International tort in specific cases; for example if the State knowingly connives at the wrongful acts of insurgents or rioters.

The decisions of International Arbitral Tribunals do not support a general condition of malice or culpable negligence. The fact that an act of an official is accompanied by malice on his part i.e., an intention to cause harm without regard to whether or not the law permits the act, does not affect the responsibility of his state. In *Jessie's case* (1921), the United States was held responsible to Great Britain for the action of its officers although such action was *bona fide* and in the belief that it was justified by a joint regulation adopted by the two countries. The tribunal laid down that :

"Any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce demands"

The tribunal did not hold that the presence of malice or culpable negligence was a condition precedent of international delinquency.

Reparation.—The State, responsible for the commission of an international tort has a duty to make separation. So far as possible reparation must undo all the consequences of wrongful act or omission. In the *Shorzow Factory* case (1928), the World Court observed, "Reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in probabilities have existed, if that act had not been committed." This means redress for the breach of international obligations is intended to eliminate war as much as possible. As *Schwarzenberger* puts it. "In the absence of a wide rule on reparation, the outlawry of war and, still more force of any kind would have meant that at the price of paying compensation, a wrongdoer would have been free to break International Law." There are three forms of reparation :

(1) Restitution in kind. (2) Satisfaction. (3) Compensation and damages.

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1. **Restitution.**—Its purpose is to preserve and maintain the *status quo* so that it is the nearest approximation to full reparation.

In the judgment on the *Chorzov Factory* (jurisdiction 1927), it was held : It is a principle of international law that the reparations of wrong may consist in an indemnity corresponding to the damage which the national of the injured state have suffered as a result of the act which is contrary to international law.

2. **Satisfaction.**—It is one of two subsidiary forms of reparation. Like restitution, this form of reparation is of a non-monetary character but unlike restitution it cannot lead to actual restoration of the *status quo ante*. The typical purpose of satisfaction is to repair breaches of international obligations in cases in which such a breach does not entail any actual damage or monetary compensation is either inappropriate or insufficient. Thus, in *Corfu Channel* case (1949) the court treated the subsequent mines sweeping operations by the Royal Navy in Albanian Waters as a violation of Albanian Sovereignty. It regarded its own declaration to this effect made in accordance with an Albanian request as "in itself appropriate satisfaction" for the international wrong inflicted on Albania.

3. **Compensation**—If restitution in kind is not possible or the claimant insists on monetary compensation, this form of reparation is resorted to. This is meant to lead to a complete restitution of the *status quo ante*. Thus illegal confiscation of foreign owned property in circumstances which amount to a breach of the minimum standard of international law amounts to an international tort, in the case compensation serves as a substitute for reparation.

As the Court explained in *Chorzov Factory* case monetary compensation corresponding to the damage suffered by individuals or corporations is the most usual form of reparation. Irrespective of whether a subject of international law makes an international claim on its own behalf, on behalf of a national or on behalf of an individual entitled to its functional protection, the claim is that of the international person concerned. The damage suffered by any object of international law, however, offers a convenient scale for the calculation of the minimum of reparation which is due to the claimant subject of international law In the absence of express authorisation international courts and tribunals lack the power to award exemplary, vindictive or punitive damages. In the *Lussitania claims* (1923) the German United States Mixed Claims Commission held that "as between Sovereign nations the question of the right and power to impose penalties, unlimited in amount is political rather than legal in its nature and therefore not a subject within the jurisdiction of this Commission." But this rule is not inflexible and in appropriate cases the court may award even exemplary damages. This was done in the *James case* (1926).

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Sometimes the court awards damages under two separate heads, one in respect of individuals put to trouble and the other in respect of the injury done to the claimant State. Such an award was made in *I am alone case*. By way of satisfaction, the United State of America had to acknowledge formally and apologise for, the illegality of the sinking of the Canadian registered ship. By way of amends for the non-material damage inflicted on Canada by the breach of the freedom of the seas, the United States were to pay to Canada £ 25,000 as damages. As in fact, the *I am alone* was the property of the United State Nationals, the Commissioners did not consider that the United States ought to pay compensation for the loss of the ship or cargo. They however recommended damages amounting to over £ 25,000 for the benefit of the captain and members of the crew who were not involved in the conspiracy to smuggle liquor for purposes of sale into United States. Thus if a State contracts with the citizens of another State, then generally there is no State responsibility in consequence of the breach of contract but if any contract is entered into with another State, that it will enforce the contract is entered into with the citizen of that State, then there will be the responsibility of State in consequence of breach of the contract with the citizens.

Q. 40. Discuss the responsibility of the State towards aliens in respect of the following :

(a) Treaty obligations.

(b) Contractual obligations.

(c) Public bonds.

A. (a) Treaty obligations.—How far a State responsible for the breach of its treaty obligations is to be determined by the terms of a treaty which are alleged to have been infringed. The breach of a provision of the treaty will give rise to responsibility As already noted earlier, it is a principle of international law that "any breach of an engagement involves an obligation to make reparation." [*Chorzow Factory Indemnity Case*]. The States may make the individuals direct bearers of right and duties in International Law. In the *Minority in Upper Silesia case* (1928) the Article 74 was interpreted as, in cases in which the declaration was obviously contrary to the true facts, any verification, dispute, pressure or hindrance whatever on the part of the authorities was not permissible.

Another important case is of the *Danzing Railway Officials* (1923). Poland which under an agreement with Danzing had taken over the Danzing railways, bound herself by the so-called agreement.

In this case the Permanent Court of International Justice held

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that if under any treaty the intention of the parties is to confer certain rights upon some individuals, then International Law will recognise such rights and will enforce them. The Permanent Court declared that, in the particular case, the intention of the parties was to create rights enforceable by private citizens and, therefore, the the Danzing officials had their cause of action against the Polish administ ration as under the agreement.

(b) Contractual obligations.—Contracts are sometimes entered into between a State and alien citizens. An alien who believes himself to be a victim of breach of a contract by a foreign Government must first exhaust such local remedies as are available to him. On his failure to get redress by the exhaustion of local remedies he may represent his case through the foreign office of his Government.

In the *Delioga* case [*Moore International Arbitrations II* 1165] between the United States and Portugal involving the seizure by the Portugese Government of a railway built by an American citizen, *Mc Murdo* in Mozambique, an arbitration tribunal in 1900 awarded damages to the claimant on the ground that the concession had been unjustly annulled, the action of the Portugese Government having been taken because of the non-fulfilment of the conditions which were not in the original contract.

It may sometimes happen as in the case of *Abu Dhabi Oil Arbitration* (1951) between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi that the proper law of the contract is not that of any particular system of municipal law On such occasions a court of arbitrator may resort to abstractions from the rules of a number of congenial systems on municipal law and fall back on the general principles of law recognized by civilized nations.

A State may, however, impliedly contract with another State that it will observe the terms of arrangement with a citizen of the latter State. But in view of the judgment of the International Court of Justice in the *Anglo-Iranian Oil Company* case (jurisdiction) I. C. J Reports (1952), it would seem that weighty proof will be required for such an implied contract. In this case International Court of Justice held that for an implied treaty in respect of a contract between a state and the citizens of another state, it is necessary that there should be sufficient evidence for the same.

North American Dredging Company Case.—[Annual Digest of Public International Law Cases, 1925-1926]. This case between United States and Mexico decided in 1926 involved a claim for damages resulting from the alleged breach by Mexico of a contract with the company for dredging at the port of *Salina Cruz*. The

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contract contained a clause by which the contractor and the persons working under him were to be considered as Mexicans in al. matters within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract."

Public Bonds—Debts.—Public bonds create problems somewhat different from those arising from contractual obligations of a State towards its aliens Public bonds are payable to bearer and may be bought and sold in the open market. As such they constitute a much looser contract than a bargain with a particular individual. 'They are a sort of impersonal contract by which the State pledges itself to all comers to meet the terms set forth in the bond. Those who buy the bonds do so on the principle of *'caviat emptor'—Fenwick.* Nevertheless, in view of the fact that a State issuing the bonds enjoys immunity from legal proceedings against them it is not unreasonable that the holders of the bonds should seek the aid of their respective Government when there is default in payment of interest or principal. Thus. discrimination by a State in favour of bond holders of one nationality against those of another will afford an evidence of good faith and the aggrieved person may seek diplomatic intervention on behalf of his Govern. ment. For examples, when the Government of Portugal undertook in 1924 to pay interest on gold bonds in depreciated currency but made an exception in favour of British holders resident in Great Britain, the United States protested against the "unwarranted discrimination." In the case of Serbians Loans involving a dispute between France and Yugoslavia resulting from the intervention of France on behalf of French holders of Serbian bonds which had been designated at the time of issue as gold loans or as being for a sum of gold francs and which Serbia sought to pay off in current gold francs of lesser value, the Permanent Court of International Justice held that the bonds must be paid in the gold francs contemplated by the contract.

Starke mentions three theories which have been advanced so as to the right of a State to protect subject creditors of another State.

(1) Palmuston's theory was enunciated in 1848. According to this theory a former State may resort to diplomatic or military intervention against a defaulting debtor-State.

(2) **Drago doctrine.**—The question how far military intervention is justified to enforce the claim of the citizens against the defaulting State assumed great importance at the opening of the twentieth century. In 1902 contractual and other claims against Venezuela were sought to be enforced by a blockade of her ports by the combined fleets of England, France and Italy. It was at this time that Dr. Drago, foreign Minister of Argentina, formulated the doctrine

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which goes by his name that a public debt cannot give rise to the intervention and much less to the occupation of the soil of any American nation by any European power.

This Drago doctrine was a corollary of the Monroe doctrine to prevent foreign powers (generally European) from interfering in the affairs of the Central and South American States in case of the latters inability to discharge their responsibility in respect of debts due to foreign nationals. During the next few years this question drew the international attention with the result that this subject was subsequently taken up at the second Hague Conference in 1907 and a convention was adopted in which the contracting parties agreed not to have recourse to armed force for the recovery of the contract debts claimed for the Government of one country by the Government of another country for the dues of its nationals, except where the State refused to accept arbitration or to submit to an arbitral award.

(3) According to the most generally accepted theory, the obligation of a debtor is similar in all respects to obligations under International agreements in general. Therefore, no special rules nor special methods of redress are applicable where a debtor defaults.

CHAPTER X

RECOGNITION

Q. 41. "For every State that is not already but wants to be a member recognition is..... necessary. A State is and becomes an international person through recognition only and exclusively" (Oppenheim). Discuss the above statement in the light of the main theories of recognition.

Or

Q. 42. What do you understand by 'recognition' ? Is the function of recognition in International Law constitutive or declaratory ? (I.A.S. 1960).

Or

Discuss the various theories of recognition in International Law. (C.S.E. 1979, 1987, 1988 ; P.C.S. 1982, 1990).

Or

A State is and becomes an International person through recognition only and exclusively. Comment (I.A S. 1973).

A. Meaning of Recognition.—Recognition, according to Fenwick, is "the formal acknowledgment by an existing member of

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the international community of the International personality of a State or political group not hitherto maintaining official relations with it."

The Institute of International Law.—Defines recognition as, "the free fact by which one or more States acknowledge the existence on a definite territory of a human society politically organised independent of any other existing State and capable of observing the obligation of International Law, by which they manifest, therefore, their intention to consider it a member of the International community."

The British Year Book of International Law, 1944.—It states that "the recognition of State implies that in the opinion of the recognizing State the nascent community possesses the requirements of Statehood and is therefore a normal subject of International rights and duties."

According to Schwarzenberger.—The growth of International law is best understood as an expanding process from a nucleus of entities which have accepted each other's negative sovereignty and on the basis of consent, are prepared to maintain and possibly expand the scope of their legal relations. Like most clubs, the society of sovereign States is based on the principle of co-option. In exercising this prerogative the existing subjects employ the device of recognition.

Oppenheim observes, "Recognition is a declaration, on the part of the recognizing State, that a foreign community or authority is in possession of necessary qualification of Statehood, of government capacity, or of belligerency."

Kelsen points out that a community to be recognised as an international person must fulfil the following requisites :—

(a) The community must be politically organized.

(b) It should have control over a definite territory.

(c) This definite control should tend towards permanence.

(d) The community thus constituted must be independent.

Thus, the conditions of a Statehood are (a) people (b) a territory (c) a government (d) sovereignty. Recognition of a State is an act by which another State acknowledges that the political entity recognized possess the attributes of Statehood.

Theories of recognition.—There are two main theories of recognition They are : (1) Constitutive theory ; and (2) Declaratory or Evidentiary theory.

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Constitutive theory :

Hegal, Anzillotti, Oppenheim etc. are the chief exponents of constitutive theory. According to Oppenheim 'through recognition only and exclusively a State becomes an International person and a subject of International Law.' This theory cannot stand the test of reason, will be evident from the divergences in the recognition of Israel of the communist Government of China, Bangla Desh. The status of a State recognized by State A but not recognized by State B, and therefore apparenty both an 'international person,' and 'non-international person' would be a legal curiosity. 'Perhaps a mere substantial difficulty is that the doctrine would oblige us to say, that an unrecognized State has neither rights nor duties at International Law and some of the consequences of accepting that conclusion might be startling.....Non-recognition may certainly make the enforcement of rights and duties more difficult than it would otherwise be but the practice of States does not support the view that they have no legal existence before recognition" (*Brierly*).

Thus according to the constitutive theory, statehood and participation in the international legal order are attained by political groups only so far as they are recognized by established States, [P. E. Corbett, the Growth of World Law (1971) p. 62].

Criticism —The view of Lauterpacht that there is a legal duty on the part of the existing States to recognize any community that has in fact acquired the characteristic of statehood does not seem to be correct. Because in practice State do not accept any such obligation.

Besides this, this theory presents several other serious difficulties. If a State is not recognised it can have neither duty nor rights under International Law according to this theory ; which is very absurd suggestion as it will create difficulties in the case of those States which are recognised by some States but not by others.

Declaratory Theory.—Thereis another group of jurists, who expound the theory which is known as declaratory or evidentiary theory, whereby they maintain that recognition has merely a declaratory and not a constitutive effect and that recognition merely declares or evidences a fact that a particular community or government possesses the necessary qualifications of a State or Government as required by International Law. They maintain that as soon as a community fulfils the necessary requirements of Statehood it becomes a State in the sense of International Law, independently of any recognition by the old States and that the act of recognition is simply a formal acknowledgment of the existence of an established fact, namely, the existence of a State in the sense of

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International Law. This theory is supported by Hall, Wanger, Fischer, Williams and Pitt-Cobbott.

Criticism.—The view that recognition is only a declaratory of an existing fact is not completely correct. In fact when a State is recognised, it is a declaratory act But the moment it is recognised, there ensue some legal effects of recognition which may be said to be of constitutive nature.

Lauterpacht's view—Lauterpacht who more or less subscribes the constitutive theory says that it (constitutive theory) is more in accordance with the practice of the states and with sound legal principle. His theory rests on the legal nature of the act of recognition, and he criticises, not only the declaratory theory but also the traditional constitutive doctrine which regards recognition as an act of policy.

The bulk of international practice is in favour of the declaratory or evidentiary theory, 'A State' says *Brierly* 'may exist, without being recognized, and if it does exist, in fact, then whether or not it has been formally recognized by the other States, it has a right to be treated by them as a State'. There are further two rules which support the evidentiary theory : (1) The fact that recognition dates back to the time when the recognized community, in fact, possessed elements of Statehood, shows that recognition does not by itself confer statehood on that community but that the State existed much prior to the date of its recognition. (2) The other well-established rule of law is that the courts of a new State will take into consideration not the date of recognition but the date on which that new State came into existence, that is to say, the date when the requirements of statehood were fulfilled. This rule again supports the declaratory theory. The result, therefore, is that the recognition simply implies a declaration or evidence of the fact that a particular community possesses the necessary qualification of statehood. According to Soviet view, birth of a State is the act of law rather than that of international law. The Soviet view and practice are also in favour of the declaratory theory of recognition. In modern times international personality does not depend upon recognition.

The German Polish Arbitral Tribunal (1929).—If declared that the recognition of a State is not a constitutive but merely a declaratory act, inasmuch as, the State exists by itself and recognition is nothing but the ascertainment of that existence. A further authority against the constitutive theory is the *Tinoco Arbitration* (1963). Here the arbitration held that the revolutionary Tinoco Government of *Costa Rica* which came into power in 1917 was a properly constituted Government, although not recognized by Great Britain, and, that Great Britain was not estopped by such prior recognition from

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later alleging that the Government was in fact a duly and properly constituted one.

In *Wulfsohn* v. *Russian Socialist Federated Soviet Republic* (1923) 235 N. Y. 255—It was held by the court that despite its non-recognition by the United States, the Soviet Union was immune from the jurisdiction of the American Courts.

Conclusion.—There is an element of truth in constitutive theory also, though the declaratory theory commands larger support, Unfortunately, the declaratory theory also has not the merit of universal acceptance. 'Probably, says *Starke*, the truth lies somewhere between these two theories'. *Lauterpacht* also subscribes to this view when he says that while recognition is constitutive in some sphere it is delaratory in the other. Inasmuch as its object is obligatory it is said to be declaratory. As recognition is decisive for the purpose of creation of international personality on account of its being treated as the normal subject of international law, it is constitutive. *Svarlien* in his 'Introduction to the Law of Nations' also holds a similar opinion when he says, ".....recognition is always declaratory in that it confirms the existence of a State and recognizes its legal position in the international community. But it may also at times be constitutive in so far as it has the effect of actually creating a State where none existed before." Prof. T. C. Chen has also remarked : "In the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the state as the ultimate source of international rights and duties, and those who regard it as being under a system of law which determines its rights and duties under that law."

Q 43. (a) Write a brief note on the modes of recognition of a new State Distinguish between de facto and de jure recognition. C. S. E. 1988.

Or

'De facto recognition of a state is a step towards de jure recognition of it.' Comment on the above statement bringing out the nature and implications of the two-kinds of recognition (I. A. S. 1974).

(b) Is recognition a purely political act ? I. A. S. 1968, 1970 ; C.S.E. 1988, P. C. S. 1973.

Or

Is recognition of State and Governments the discretion of the recognizing State ? Discuss the position. [I. A. S. 1960].

Ans. (a) Modes of recognition.

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(i) Recognition may be express or implied.—Recognition may be either *express or implied.* It may be expressed by notification or declarations or it may be inferred from some conduct on the part of the recognizing States. The conduct is to be such as may clearly show an unequivocal intention to recognize. In either case the recognition may be *individual* or *collective.* An express declaration by a State, to the effect that it recognizes a nascent society as a State, furnishes, the example of an individual and express recognition. In case the recognizing State sends its consular representative to the State to be recognized, it is an individual and implied declaration. Collective express or implied recognition is secured by some collective international act on the part of some nations or through the medium of an international institution like the U. N O. There are a number of historical precedents of collective recognition, *e. g.*, recognition of Bulgaria, Montegro, Servia and Rumania by the Berlin Congress of 1878 and of Estonia and Albania by the Allied Powers in 1921. In the light of the advisory opinion of the International Court of Justice on *Condition of Membership of the United Nations*, which recognizes statehood as a primary qualification for admission to the United Nations, it is clear that such admission is tantamount to recognition of the member admitted as a State.

(ii) De facto and de jure recognition.—*Defacto* recognition is provisional and can be withdrawn while *de jure* recognition is legally binding and permanent. Recognition *de jure* implies that the State or Government in question is fully qualified to be a member of the international community, recognition *defacto* on the other hand implies a temporary and provisional acknowledgment on the party of the recognizing State to the effect that the State seeking recognition is in fact qualified to be a member of the international community. *De facto* recognition means that the new State or Government though independent and in effective control of the territory has not acquired sufficient stability so as to able to fulfil international obligations. *De facto* recognition may be regarded as a preclude to the permanent type of recognition that is *de jure* recognition. "When a State wants to delay the *de jure* recognition of any State, it may, in the first stage grant *de facto* recognition."

(Schwarzenberger)

In the words of Oppenheim, "the *de facto* recognition of a State or government takes place when, in the view of the recognising State the new authority although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not yet offer proposed of complying other requirements of recognitions such as willingnes or ability to fulfil international obligations.

The Soviet Government was recognized *de facto* by Great Bri-

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tain in 1921, the *de jure* recognition came in 1924. Similarly the Italian Conquest of Abyssinia was *de facto* recognized in 1936 by Great Britain but it was recognized *de jure* in 1938. The grant of *de jure* recognition presupposes the existence of the following facts—

(1) that there is a reasonable assurance of stability and permanence of the new State Government ;

(2) that the State or the Government commands the general support of the population ;

(3) that the new State or the Government is both able and willing to fulfil its international obligations.

The distintion between *de jure* and *de facto* recognition is not one of the form but of substance. According to W. W. Bishop, the distinction between *de facto* and *de jure* recognition is political rather than legal. According to Kelsen, "From the juristic point of view, the distinction between *de jure* and *de facto* recognition is of no importance. Any codification of International law relating to recognition can ignore it." But in the views of Fenwick and Lauterpacht there are certain differences between *de facto* and *de jure* recognition. The State or Government recognized *de jure* can claim to receive property situate within the recognizinng State while the State or Government recognized *de facto* can make no such claim. It is only the recognized *de jure*, that can present the old State in matters of State succession. The case of *Halie Selassie* v. *Cable and Wireless, Ltd.*, (1939 Ch. 182), is a case on this point.

It may, however, be noted that the acts of the Government recognized *de facto* with respect to persons and property of the governed territory are considered valid as compared to the acts of the *de jure government which are regarded as nullity. In the case of Bank of Ethiopia* v. *National Bank of Egypt & Liguori*, it was held that the decree of the Italian Government which had been recognized as being in control *de facto* of Abyssinia was valid and effective. This case was followed in another case *Luther* v. *Sagar*, (1937) Ch. 517, where it was laid down that the act of the Soviet Government which had been recognized *de facto* by the British Government must be treated by the courts with all respect due to the acts of a duly recognized Sovereign State.

In *Luther* v. *Sagar*, it was held that there is no distinction between *de facto* and *de jure* recognition for the purpose of giving effect to the internal acts of the recognized authority.

(b) Is recognition purely a political act ?—The question sometimes arises whether recognition is a legal or a political act. Judge *Lauterpacht* is the votary of the view that recognition is granted or withheld on legal principles. He criticizes the traditional constitutive

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doctrine which regards recognition as an act of policy. According to him, the wide acceptance by the international lawyers of the declaratory theory is really due to a reaction against the traditional conception of recognition as a political act purely and simply. He argues that there is a duty on each State towards the international community to recognize a new State or new Government fulfilling the legal requirements or statehood or other necessary qualifications. His thesis proceeds on the line of the majority of view of the International Court of Justice in its advisory opinion on *Conditions of Membership of the United Nations*, (1948) where the court held that the member States voting for the admission to the United Nations of a new member were under a duty to confine themselves to the conditions for candidature set out in Article 4 of the Charter, and could not take into account extraneous political considerations.

Lauterpacht's suggestion, however, does not appear to be plausible for as *Starke* points out the weight of precedents and practices, such as the divergence in the recognition of Israel and the Communist Government of China can hardly be reconciled with the views. *Starke* further observes that the action of the States in affording or withholding recognition is as yet uncontrolled by any rigid rules of international Law. On the contrary, recognition is treated for the most part, as a matter of vital policy that such State is entitled to decide for itself. *Podesta Costa's* view that recognition is a 'facultative' and not an obligatory act is more in consonance with the practice.

This view is also shared by *Brierly* who observes ; "In practice and more especially in recent years non-recognition does not always simply tell that the existence of the unrecognized State is a matter of doubt, States have discovered that the granting or whithholding of recognition can be used to further a national policy ; they have refused it as a mark of disapproval.....recognition is supposed to be a mere acknowledgment as when in 1903 the United States recognized Panama only three days after it had revolved from Columbia and at the same time took steps to prevent the re-establishment of Columbian sovereignty or when in 1948 the United States recognized Israel within a few hours of its proclamations of independence."

Q. 44. Recognition is a "facultative" and not "obligatory act". Discuss fully this statement in relation to the theories as to the nature, function and effect of recognition. (I.A.S. 1969).

Ans. Recognition is, as the practice of most States shows, much more a question of policy than of law. The policy of recognising States is conditional principally by the necessity of protecting its own interests, which lie in maintaining proper relations with any

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new State or new Government that is likely to be stable and permanent.

It is important that in considering the International Law and practice as to recognition, due allowance should be made for the exigencies of diplomacy. States have frequently delayed, refused or eventually accorded recognition to newly formed States or Governments for reasons that lacked strict legal justification.

In view of Lauterpacht, a State possess the elements of statehood, international law impose a duty on the State to recognize such a community. The view of Lauterpacht is not supported by the parties of the States. Because in practice State have not consented to any such obligation.

No right to recognition is laid down in the Draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in 1949. The action of States in affording or withholding recognition is as yet uncontrolled by any rigid rules of International Law ; on the contrary recognition is treated, for the most parts as a matter of vital policy that each State is entitled to decide for itself.

Podesta Costa's view that recognition is a 'facultative' and not an obligatory act is more consistent with the practice. There is not even a duty on a State under International Law to withdraw recognition if the qualifications of Statehood or of government authority ceases to exist. The apparent arbitrariness of State practice in this regard is tempered by the consideration that most States endeavour, as far as possible, to give recognition according to legal principle and precedents, to the extent at least that although they may withhold recognition for political reasons, when they do grant it they generally make sure that the State or Government to be recognised at least possess the requisite legal qualifications. To this degree States do treat recognition as a legal act.

Now, the question arises whether recognition is political or discriminatory act. In fact the granting of recognition depends upon the discretion of the recognizing State. In other words international law leaves the State free to determine as to whether a particular State possess the essential element of statehood.

The practice of States shows that recognition is a political function. Recognition constitutes the weakest link in international law. Since recognition tends to enhance the prestige of recognized community and also sometimes its material resources, recognition is accorded prematurely to sympathetic regimes and is protectedly withheld from unsympathetic ones.

Q. 45. What are the legal consequences of recognition of State

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or a Government ? Has a non-recognised Government any status in International Law ? What are disqualifications due to no-recognition ? C.S E. 1990.

Ans. Consequences of Recognition.—Recognition produces legal consequences affecting the rights, powers, and privileges of the recognized State or Government both at International and Municipal Law of States which have given its recognition. Also, when the subject of recognition arises for examination, however, incidentally, by the municipal court of such State, various problems of evidence, interpretation and procedure enter into consideration.

Here, it is important to bear in mind the limits between International Law and State law. Recognition confers on the recognized State or Government a status both under International Law and Municipal Law.

Some of the important consequences which flow from the recognition of State are :

(i) The recognized State or Government acquires the capacity to enter into diplomatic relations with the recognizing States and to make treaties with them.

(ii) In the case of a recognition of a new Government an old State the previous treaties of the predecessor of the new Government are automatically revived and come into force.

(iii) The recognized State or the Government gets a right of suing in the courts of the recognizing State.

(iv) The recognized State or the Government acquires for itself and its property, immunity from the jurisdiction of the court of law of the recognising State.

(v) The recognized State or Government becomes entitled to demand and receive possession of the property lying within the jurisdiction of a recognizing State.

(vi) The courts of law of the recognizing State are after recognition, precluded from questioning the legality or validity of the legislative or executive acts of the recognized State and of the Government.

(vii) The recognized State or Government becomes bound to respect international obligations in general and with respect to the recognizing State in particular.

Legal disabilities of an unrecognized State or Government.—Although, recognition is essentially a political act, there are certain political as well as legal consequences of non-recognition of a

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State. 'Recognition' can bring, *inter alla* an opportunity to establish diplomatic and consular relations with the recognising States; an increase in stability at home and prestige abroad ; access to foreign aid, loan and trade and in the case of new government of an established State access to State funds on deposit in the bank of recognising State. A decision to withhold recognition can be powerful or an important political weapon, depending upon the relative power of non-recognizing and unrecognized entities. The principal legal disabilities of an unrecognized State or Government may be enumerated as follows :

(a) It cannot sue in the court of a State which has not recognised it. The principle underlying this rule was thus expressed in *Russian Socialist Feaerated Soviet Republic* v. *Cibrario* (1923)..... "A foreign power brings an action in our courts not as a matter of right Its power to do so is the creature of commity". In *Re Al Fin Corporations Patent* (1970) Ch. 160, it was held that the Court shall recognize the executive acts of only those States who have been recognised.

(b) By reason of the same principle the acts of an unrecognized State or Government will not generally be giving in the courts of a non-recognizing State the effect customary according to the rules of comity.

(c) Its representatives cannot claim immunity from legal process.

(d) Property due to a State, whose Government is recognized, may actually be recovered by the representatives of the regime which has been overthrown.

(e) The unrecognised State cannot enter into diplomatic relations with the State which does not recognize it.

(f) The unrecognized State cannot enter into treaty and commercial relations with the unrecognizing State.

(g) Such States are not entitled to get their property situated in foreign State (*Bank of China* v. *Wells Fargoe Bank*, (1952) 104 F. Supp. 59).

Tinocco Concessions case.—Great Britain claimed that certain British Companies had acquired certain rights against *Costa Rica* by contracts entered into with one Tinocco. It appears that in 1917 Tinocco overthrew the existing Government of *Costa Rica* and established a new constitution which lasted till 1919, when the old constitution was restored and Tinocco ousted ; and that in 1922 the restored government passed legislation nullifying all engagements entered into by Tinocco's Government. During the regime of Tinocco a number of concessions were granted to the British Companies and

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the Government of Tinocco became heavily indebted to the Royal Bank of Canada, on British Corporation.

The Chief Justice *Taft* held that if Tinocco's Government was the actual Government of *Costa Rica* at the time when the rights were alleged to have been acquired, the restored Government could not repudiate the obligation which his acts had imposed on the State of *Costa Rica*. He further said that this question must be decided by evidence of the facts. It was immaterial that by the law of *Costa Rica* Tinocco's Government was unconstitutional. Even the objection put forward by *Costa Rica* that many States including Great Britain herself, had never recognized Tinocco's Government, was only relevant as suggesting, though it did not prove, that Government had not been the actual Government of *Costa Rica*, but since Tinocco, was in an actual and peaceable control without resistance or conflict or contest by any one until a few months before the time when he retired, he held that his acts were binding upon *Costa Rica*.

Q. 46. State the conditions under which insurgent forces rebelling against a parent Government may be recognised as belligerents. What are the consequences of the recognition of belligerency ?

Ans. Recognitions of insurgents as a belligerent power.—The recognition of insurgents as belligerent power resembles recognition of a community as a State and is altogether different from recognition of insurgency. When a State is involved in Civil War and the insurgents gain effective control over a part of the territory and the people of the State involved in Civil War, the entity resembling a State comes into existence and International Law cannot fail to take notice of it. In the view of judge Lauterpacht if the State recognizes the insurgents of another State, it would imply that it would not treat such insurgents as violators of law. It also implies that such a State wishes to establish relations with such insurgents on a temporary basis. The effect of insuregency is that it partially internationalises the conflict. In the view of judge Lauterpacht, it is not against international law to recognize insurgents as a *de facto* government over the territory under their control. Recognition of insurgent as a belligerent power depends on the existence of the following facts ;—

(i) That the insurgents have a Government and the military organisation of their own.

(ii) That the insurrection is conducted in the technical form of war.—In other words, when the Civil War assumes the true character of international war especially regarding the means of destruction used by the parties.

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(iii) That the insurgents have an effective control over a certain part of the territory of the State involved in Civil War.

(iv) The hostilities should be of such magnitude that the foreign States may find it necessary to define their attitude towards the belligerents and the established government.

Consequences of recognition of belligerency.—The following consequences flow from the recognition of the insurgents as belligerents :—

(i) The rules of international Law as to war and neutrality apply to the relations between the recognizing State and the insurgents recognized as belligerent power. The recognizing State takes the position of a neutral State with regard to the Government of the insurgents and the legitimate Government of the State against which insurrection is directed. If the legitimate Government has recognized the insurgents as belligerent power the persons involved in the Civil War falling into the hands of the opposite party are regarded as prisoners of war and cannot be prosecuted as criminal or for high treason or the murder by the legitimate Government.

(ii) Insurgents assume a *de facto* international character in respect of the rights and duties of legal warfare. The insurgents get right of their ships into the ports of the recognizing State and the right of visit and search on open sea.

Premature recognition of the insurgents as belligerent power is regarded as an unfriendly act by legitimate Government. It may also be noted that belligerent recognition is quite distinct from the recognition of either the parent or insurgent Government as the legitimate Government.

Q. 47. Distinguish between recognition of State and Government, recognition of belligerency and recognition of insurgency P C.S. 1988, C S E. 1987.

A. Recognition of States and governments.—The recognition of State is different from recognition of new hands and of Government of old States. The recognition of a new State implies admission of a new political group into the membership of the political community and involves the decision that new State is firmly established and is capable of discharging international obligations, but recognition of new head or of new form of Government of an old State which is already an International person involves no such decision. The granting or refusal of recognition of a Government has nothing to do with the recognition of the State itself. If a foreign State refuses the recognition of a change in the form of Government of an old State, the latter does not thereby lose its recognition as an

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international person—*Leigh Valley Rail Road Co.* v. *The State of Russia*, (1927) 21 F. (2d.)

Recognition of belligerency and recognition of insurgency.—The recognition of insurgents as belligerent power is different from the recognition of the insurgents as a new State. As stated by British Foreign Secretary in 1937, Mr. (later Sir) Anthony Eden :—

"Recognition of belligerency is of course quite distinct from recognizing any one to whom you give that right as being the legitimate Government of the country. It has nothing to do with it. It is a conception simply concerned with granting rights of belligerency which are of convenience to the donor as much as they are to the recipients."

It is not necessary that insurgents may always be recognized as belligerent power, for recognition of belligerency implies the existence of an organized political group in effective control of a certain territory. When insurgents are unable to control a certain territory and are not sufficiently organized to offer resistence to the mother country and, therefore, not in a position to comply with the rules of International Law as to war, they cannot be recognised as belligerent but can be recognized as insurgents only. The necessity of granting the recognition to insurgency arises when other States while refraining from treating the insurgents as mere law-breakers recognized them as persons in *de facto* authority and consider it advisable to keep good relations with them.

Q. 48. As a rule, recognition de jure once given is irrevocable (Starke). Discuss the proposition with suitable concrete examples.

A. Withdrawal of recognition.—As a rule, recognition *de jure* once given is irrevocable. This holds true even though recognition was given in the first instance from more political motives to indicate to the world at large that relations with the recognized State or Government are being initiated. It is a paradox that when a gesture is made in a contrary sense, indicating that no further relations will be maintained with the formerly recognized State or Government, it is not in general attended by a withdrawal of recognition. A formal severance or diplomatic relations may be declared, but once recognized, the State or Government does not otherwise lose its status in the International community, Thus Great Britain recognized the Soviet Government *de jure* in 1924, but later broke off relations in 1927, and although relations were subsequently resumed, participated in the vote of 1939 expelling the Soviet Union from the League of Nations. Neither the rupture of diplomatic relations nor the act of expulsion annulled recognition of the Soviet Government.

Sometimes, a refusal to recognize is virtually equivalent to a State of severance of diplomatic relations. This is particularly well-

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illustrated by the attitute of the United States of non-recognition of the Soviet Government before November, 1939, when recognition was given. A communication of the U. S. Department of State to the New York Court of Appeals in 1933 characteristically defined this attitude.

"The Department of State is cognizant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact.

The refusal of the Government of United States to accord recognition to the Soviet regime is not based on the ground that the regime does not exercise control and authority in territory of the former Russian Empire, but on other facts"—*Salimoff & Co.* v. *Standard Oil Co. of New York*, (1933) 262 *N. V.* 220.

Non-recognition of a new State or new Government does not mean non-intercourse with other States, just as non-intercourse does not necessarily signify non-recognition. For instance, the British Government has in practice never declined to transact necessary business with the agents of unrecognised States or Governments although it has been made plain that such informal relations did not in any sense amount to informal diplomatic intercourse. Thus, frequently consular appointments have been made to such unrecognized communities although case has been taken to axpress the appointments in such a way as not to involve even *de facto* recognition. Moreover, in 1919, 1920 Great Britain, while denying formal recognition of the Provisional Government of Northern Russia, maintained relations with its representatives in London for the purpose of collaboration in military operations against the Soviet Government. Similarly, Soviet Russia established consulates in "Manchukuo" in 1933, but refused to recognize "Manchukuo" *dejure* or *de facto*.

Q. 49. What do you mean by Recognition which is subject to a certain condition ? Discuss.

Or

What is the nature and effect of the Recognition when it is subject to a condition ? Discuss.

Ans It is in this connection important to note that sometimes, States are recognised subject to a condition, generally, an obligation, which they undertake to fulfil. For example, the Berlin Congress of 1978 recognised Bulgaria, Montenegro, Serbia and Rumania, under the condition only that these States should not impose any religious disabilities on any of their subjects.

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Effect.—The effect of such conditional recognition is that failure to fulfiil the obligation does not annul the recognition, as once given this is incapable of withdrawal. By breaking the condition, the recognised State is guilty of a breach of International Law, and it is open to the recognising State to sever diplomatic relation as a form of sanction or othewise to proceed. But, the Status which recognized State has obtained from the act of recognition cannot then be retracted. By way of exception, however, the conditional recognition of States or Governments which are first in process of emerging is probably revocable. Thus the recognition in 1919 by Great Britain of Esthodian National Council for the time being provisionally and with all necessary reservations as to the future was no doubt revocable in the sense that it did not constitute an undertaking to continue the recognition if conditions altered.

"It is true, however, that recognition should under International Law become purely and simply the cognitive act of registering the existence of Statehood or of governmental capacity, logically it should not be subject to any such extrinsic terms of condition."—*Starke*.

In the famous case of Trust Territory of Ruanda-urundi, Judge Lauterpacht had declared that the test (sometimes referred to as a "condition") applied recognising a new State or new Government of its willingness to fulfil international obligation was "of doubtful judicial soundness", and unrelated to the true purpose of recognition.

Starke does not agree with the views of Lauterpacht and says that this view seems to contradict the practice of most States. Moreover, there is some inconsistency here with his view that the United Nations might well deem admission to it a proof of Statehood or governmental capacity, for does not Article 4 of the Charter provide that United Nations membership is open to "peace loving State" which in the judgment of the organisation are "able and willing" to carry out the obligations of the Charter ? Also, does not the observance of International Law by a new State or new Government provide some evidence of its stability or chances of persistence ?

Q. 50. ".....the recognition of a new State or Government has a retroactive operation, and relates back to the date of inception of the particular State or Government concerned"—(Starke).

Discuss the above statement. Cite relevant cases in support of your answer. Point out the limits of the retroactive effect of recognition.

A. Retroactive effect of recognition.—Jurists are of the view

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that *de jure* recognition has retroactive effect. In other words when a State is recognized, its acts done prior to recognition are also recognized.

In British Courts, such retroactive operation is extremely wide. Thus :—(a) A cause of action based upon the existence of a particular State or Government at the date of institution of proceedings is nullified if before or at the time of the hearing, the British Government recognizes another State or Government as having been in existence at the date of the action was commenced—*Van Heyningen* v. *Netherland East Indies* (1949) *Queensland State Report 54* (b). A judgment of a court of first instance based upon the existence of a particular State or Government at the date of judgment may be set aside on appeal if before or at the time the appeal is heard the British Government recognises another State Government as having been in existence at the time the judgment was delivered. *Aksionairnove Obschestvo A. M. Lauter* v. *Sagor* (*James*) & *Co.*, (1921) 3 K. B. 532.

Two decisions of the House of Lords, namely *Gdynia Ameryka Linie* (*Zeglugowe Spolka Akeylna*) v. *Boguslawaki*, (1953) A. C. 11 and *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, (1953) A. C. 70—have further elucidated the retroactive effect, according to British Courts, of a recognition by Great Britain. The former case shows that in the matter of retroactive operation of recognition, the certificate of the executive is to be treated as or overriding importance hence if such certificate plainly shows that recognition was not intended to relate back, any retroactive effect is excluded. The latter case shows that duly vested proprietorial or other rights, resting upon a duly effected disposition or other legal act by the formerly recognised *de jure* Government cannot be invalidated by the subsequent recognition *de jure* of the new Government ; *prima facie* recognition operates retroactively not to invalidate the act of a former Government, but to validate the acts of a *de jure* Government which has become the new *de jure* Government.

Both cases contain *dicta* in the judgment to the effect that *prima facie*, recognition *de jure* cannot operate retroactively to validate acts done otherwise than in the territory, and so within sphere of *de facto* control of the Government recognized ; but this, it is emphasized, is only a *prima facie* rule.

Q. 51. Write short critical notes on :—

(a) Recognition of a Government in exile ;

(b) The Stimson Doctrine ; and

(c) The Extrada Doctrine.

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A. **(a) Recognition of a Government in exile.**—The Government of a State is said to be in exile when during the course of war on the occupation of the territory of a State by enemy forces government of that State is established temporarily on the territory of a friendly State. The occupation of the territory by the enemy during war cannot imply that the enemy has got effective control over the territory and the government; though in exile and not in effective control of the territory will be deemed to making efforts to re-establish itself. As long as the war goes on and the government in exile is making active efforts to regain the effective control of its territory the belligerent occupation will be deemed to be only temporary. The government in exile can be recognized as the government of the occupied territory so long it continues its efforts through war to regain control of its territory. The failure of the government in exile to regain control of the territory at the termination of war will disentitle it to be recognized as the government of the State. Recognition of governments in exile is based on the same principle as recognition of governments in general. A government in exile which is unconstitutionally established may he recognized in accordance with the principles of recognition of new governments coming into power by unconstitutional means. Recognition may be implied in the act that a friendly State consents to the establishment of the government in exile on its territories.

During the Second World War governments of many States established their headquarters in London and were recognized.

(b) The Stimson Doctrine.—The position taken up by Mr. Henry L. Stimson, the then Secretary of State of the United States of America, on the Japanese invasion of the Chinese Province of Manchuria in 1932 was that his country *i. e.* America did not intend to recognise any situation, treaty or agreement which might be brought about in contravention of the covenant and the obligations of the Pact of Parts of 1928. Both China and Japan as well as America were parties to the Pact of Paris, 1928. The principle laid down by Stimson was that a situation brought about illegally, that is to say in violation of International Law, could not be legalised by the act of recognition and this is known as the Stimson Doctrine after the name of its propounder. The force of this doctrine was recognised by the Assembly of the League of Nations which on March 11, 1932 adopted the resolution declaring that, "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris."

(c) The Estrada Doctrine.—This doctrine was propounded by Foreign Minister of Mexico, Senor Estrada, who in a note to the diplomatic representative of Mexico, dated September 27, 1930

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made a declaration of the policy of his Government. He declared that regarding the establishment of diplomatic relations with other States Mexico government considers itself free to determine it in accordance with the facts and circumstances of each case. If the Mexico government considers that after the change of a government in any State through revolution, a revolutionary government commands the support of the people, it may establish diplomatic relations with it.

This doctrine is not inconsistent with the established practice of States and advises a new course of action. It affirms the duty of continuing of diplomatic relation without any regard of the revolutionary changes in States. The doctrine has not gone without criticism. It eliminates a subjective test of the ability of the new Government to shoulder international obligations and replaces declaration of recognition by the act of maintaining diplomatic relations. *Fenwick* criticises the doctrine on the ground that it is based on a "mistaken interpretation to the practice of recognition involving an enquiry into the legitimacy of the new Government when the enquiry is actually into its representative character." According to Phillip C. Jesup, "the Estrada doctrine properly assumed that diplomatic representative should be considered as accredited to the State and not to the government." This doctrine therefore does not seems to be correct and needs to be discouraged.

CHAPTER XI

STATE TERRITORY AND JURISDICTION

Q. 52. What do yon mean by territorial sovereignty ? Discuss its extent and nature.

A. Territorial Sovereignty—Its meaning.—As we have seen, one of the essential elements of Statehood is the occupation of a territorial area, within such State law, operates. Over this area supreme authority is vested in the State. Hence there arises the concept of "Territorial Sovereignty" which signifies that within this territorial domain jurisdiction is exercised by the State over persons and property to the exclusion of other States. This concept bears an obvious resemblance to the patrimonial nations of ownership under private law, and in fact the early writers of International Law adopted many of the civil law principles of property in their treatment of State territorial sovereignty. To this day, their influence has persisted so that in particular the rules as to acquisition and loss of territorial sovereignty plainly reflected the influence of the civil law, territorial sovereignty being assimilated to private ownership.

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Territorial sovereignty was described by Max Huber, Arbitrator in the Island of Palmas Arbitration in these terms—

"Sovereignty in relation between State signifies Independence. Independence in regard to a position of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State."

It is sometimes said that territorial sovereignty is indivisible, but there have been numerous instances in international practice both of division of sovereignty; and of distribution of the components of sovereignty. For instance, sovereignty is often shared jointly by two or more Powers as in the case of condominium. Moreover, leases or pledges of a territory are frequently made by one State to another, as for example, the leases of Chinese territory to Russia, France, Germany and Great Britain at the end of the last century during the so called "Battle of the Concession." In the case of a lease, temporary sovereignty is exercised over the lessee State, while the lessor State possesses a sovereignty in reversion. Again, sometimes, sovereignty over a State is held by one or more powers in trust for the population of the territory concerned, as for example in the case of the League of Nations control over the State before its return to Germany in 1935 Thus, International Law does not appear to restrict the manner in which the sovereignty as to particular territory can be bestowed on, or withdraw from, any State.

Its extent.—The territory may be described as the sphere of jurisdiction of a State. A State is supreme within its territory. "The territory of the State is a space within which acts of the State and specially its coercive acts, are allowed by general international law to be carried out, a space within which the acts of a State may legally be performed"—*Hans Kelson* : Principles of International Law, page 209 The territory of a State consists in land and water and always has well defined boundaries. The waters of territory are national or territorial. The national waters consist in its lakes, in its canals, in its rivers together with their mouths in its ports and harbours and in its gulf and bays. The territorial waters consist of water lying within a certain zone or belt called the 'maritime belt' which surrounds a State. The national waters belong exclusively to the State and no foreign State can claim a right of passage through them, while territorial waters can be used for passage by foreign ships. The territorial waters begin from a spot at which the national waters end.

Its nature.—The territory is the public property of the State. It is not the property of the monarch of the State or the Government of the people. The territory belongs to the State which has the right to exercise its supremacy over it. A State may give up its right of supremacy in favour of another State. The State owning

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a territory is competent to hand over the administration of a part of its territory to some foreign State on certain conditions. In such a case the supermacy is exercised by the Foreign State with the consent of the owner State. The Island of Cyprus was under British supremacy with the consent of its owner State Turkey during 1878 and 1946. The owner-State may lease, give away, sell or exchange its territory.

Q. 53. What do you understand by 'maritime belt' ? What are its chief characteristics ?

(b) With reference to the views regarding the breach of territorial waters under the sovereignty of a State, consider whether you could say that existing International Law recognizes any fixed breadth of the belt of territorial sea.

Or

Discuss the evolution of the law relating to territorial waters with particular reference to 'the Anglo Norwegian Fisheries case' and the work of the International Law Commission in this behalf.

A. (a) Maritime Belt.—States having sea coast are under International Law entitled to exercise supremacy over a certain portion of the sea which touches their land territory. The part of the sea over which the State having a sea coast or a littoral State exercises territorial *supremacy* and which is regarded as a part of the territory of the littoral State is known as the maritime belt. According to the view of the majority writers this maritime belt is measured from a straight line drawn along low-water-mark of the sea. Starting from this low-water-mark, the breadth of the maritime belt is generally recognized to be three miles. The maritime belt of three miles in width measuring from the low-water-mark of the sea represents the part of the territory of the littoral State.

The chief characteristics of this maritime belt are :

(a) The littoral State is competent to make rules and regulations for passage of vessels of foreign State as they are supreme within their belt.

(b) The littoral State may enter into treaties with regard to the Cabotage.

(c) The littoral State may reserve the fisheries within the belt for its own subjects.

(d) The littoral State is competent to make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as may enter its territorial maritime belt.

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(e) The littoral State is bound to keep the maritime belt open to merchantmen of all nations for inoffensive navigation. The littoral State cannot levy tolls for such passage of foreign vessels. Only those foreign vessels which may cast anchor within the belt or enter its part may be made liable for dues and tolls by the littoral State.

(f) The littoral State cannot refuse passage of foreign men of war through its maritime belt in times of peace.

(b) Evolution of the law relating to territorial waters.—In the beginning several maritime States asserted rights of ownership and appropriation of portions of the open sea but effective occupation of large stretches of the oceaan by any single State have been rendered impossible, their extensive crimes were gradually whittled down. In the long run, the only parts of the open sea over which a State was recognised to have sovereignty were such coastal waters as were necessary to that State's safety or which it had power to dominate. In Eighteenth century *Bynkershoek* enunciated his cannonshot rule in his celebrated work *De dominia Maris dissertatio*. The rule stated that the littoral State could dominate only such width of coastal waters as lay within range of cannonshot from shore batteries. Later on an attempt was made to express the cannonshot range as a definite figure in miles. In the end of Eighteenth century Galiani and Azuni adopted a figure of three miles from the shore as "the greatest distance to which the force of gunpowder can carry a ball or bomb" out to sea.

The principle of three-mile limit however received wide spread recognition by the jurists as well as by the courts and in the practice of States in the nineteenth century. The Anglo American Fishing Treaty of 1818 had recognized the three-mile rule in international practice. Great Britain had by then become a firm supporter of the three-mile limit. But there are several States like Sweden, Norway, Spain and Portugal claim a belt of greater width, i. e. even more than three miles.

Nevertheless the three-mile rule is universally accepted as a minimum and it can safely be postulated as a customary rule of International Law that the recognized minimum breadth of the belt is three miles. There is however no unanimity with regard to the three-mile rule as a maximum. The Hague Codification Conference of 1930 considered the subject of territorial waters but failed to arrive at any definite agreement on the breadth of belt.

The law of the territorial sea has been considerably influenced by :—

(a) The decision in 1959 of the International Court of Justice in the *Anglo-Norwegian Fisheries case*—

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(b) The work of International Law Commission on the law of the regime of the high seas.

Anglo-Norwegian Fisheries case.—The question before the court was whether a Norwegian Decree of July, 1935, creating a Norwegian Fisheries zone was, as claimed by Great Britain, contrary to International Law. The Decree purported to define such a zone by reference to base lines drawn through 48 selected points on the mainland , the sea enclosed by these lines and the adjoining seaward belts of waters to a width of four miles was to constitute the zone. The result of the Decree was to exclude large stretches of sea, including wide and deep coastal identations which normally would have been open sea in which other States would have been entitled to fish. The Court held by a majority that the Decree was not contrary to International Law. It was not necessary that the base line should follow the low-water-mark ; it was sufficient that it should follow "the general direction of the coast", and this the lines drawn by Norway did.

The net result of the decision are—(i) That provided that a littoral State can satisfy an international tribunal of the reasonableness and justice of defining the territorial sea by reference to base lines, and that if it has not acted arbitrarily this method may be followed. (ii) That such base lines need not be drawn parallel to the low-water mark on the coast so long as the general direction of the shore is followed, (iii) That the waters of bays and gulfs may be deemed part of the territorial waters, notwithstanding that the distance between the head lands is greater than ten miles.

Work of International Law Commission.—The Report of the Commission on the work of its eighth session (1956) reveals the following things—(1) That having regard to the trend of the practice of most States, the doctrine of contiguous zone should be given a limited degree of recognition, enabling States to exercise jurisdiction and control (*but not Sovereignty*) over such zones for the purpose of preventing and punishing the infringement of fiscal customs and sanitary law, provided that such jurisdiction and control should not be exercised at a distance greater than twelve miles from the base line from which the width of the territorial sea is measured. It is to be noted that the Commission did not favour any recognition of the contiguous zones doctrine for purposes of security or protecting coastal fisheries.

(2) That in no case should be breadth of the territorial sea itself exceed twelve miles.

(3) That, in accordance with the *Anglo-Norwegian Fishries Case*, straight base-lines may be adopted for measuring the territorial sea. When the circumstances of the Coastal State necessitate a

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special regime because the coast is deeply idented or because of the proximity of the islands, such base-lines must not materially depart from the general direction of the Coast, and account may be taken of economic interest peculiar to a region, if they correspond to a long usage.

The matter also came forward at the Geneva Conference of 1958 but no definite result could be arrived at. 'The broad position at the beginning to the conference was that some twenty one States still claimed only three miles, seventeen States four or six miles, thirteen States between nine and twelve miles, and nine States exclusive right in the waters of the Continental Shelf, while a number of others had not taken up a definite position.' Thus controversy in regard to the breadth of the territorial waters could not be resolved in this conference. In 1960, another conference, known as Geneva Conference, 1960 was convened. In this Conference, a compromise formula was presented by America which provided that the breadth of the territorial waters would be 6 miles and beyond 6 miles the coastal states should be given rights for fishing etc., for another 6 miles. But, unfortunately, the proposal could not be accepted.

In July 1977, Sea Law Conference of the United Nations met but could not arrive at any final agreement.

The controversy relating to breadth of territorial sea has finally ended with the adoption of the *U. N. Convention on the Law of the Sea*, 1982. Article 3 of the convention provides that every State has the right to establish the breadth of its territorial sea upto a limit not exceeding 12 nautical miles measured from base lines determined in accordance with this convention. Under Article 4, the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline, equal to the breadth of the territorial sea.

Q. 54. Discuss the provisions of International Law in regard to (a) international rivers and (b) Inter-oceanic canals. (I. A. S. 1969, C. S. E. 1987).

A. (a) International rivers.—Where a river lies wholly within the territory of one State, it belongs entirely to that State, and generally speaking no other State is entitled to the right of navigation on it. Also where a river passes through several States. each State owns that part of the river which runs through its territory, but controversy has centred round the question of the rights of riparian and other States to navigate along the whole length of the river. Several International Jurists alongwith Grotius have opined that there is a general right of passage for all States along such international rivers. But this view has never been generally accepted

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in practice, and is certainly not recognised as a customary principle of International Law. Even writers who hold that there is freedom of navigation differ in their interpretation of the extent to this right :—

(a) some writers held that such right of passsage is confined to time of peace only ;

(b) others assert that only countries through which an international river passes have a right of passage ;

(c) a third group maintains that freedem of passage is without any limitation, subject only to the right of each State to make necessary and proper regulations in respect to the use of the river within its boundaries.

However, such measure of freedom of navigation as became established on international waterways was almost entirely the creation of treaty. The process began with the Treaty of Paris, 1814, and the Vienna Congress of 1815, and continued with the Peace Treaties of 1919, 1920, and the subsequent general conventions concluded under the auspices of the League of Nations. As a result there was, before the Second World war, a limitted freedom of navigation on most of the great river systems of Europe, while river systems in other continents came under special regional agreements, or had b en opened for navigation, subject to varying restrictions, by the States having sovereignty over them.

It might well be generally recognised that such State should not impose arbitrary or excessive dues and should not treat non-riparian States in a discriminatory or unequal manner, and that all navigable channels in internationally used waterways should be properly maintained, with due warning of dangers where necessary. Subject to this, the necessity for regional agreements dealing separately with the problems peculiar to each international river cannot be gainsaid.

So far as the injurious use of river, waters, or the diversion of, or an interference with, the free flow of rivers is concerned, International Law has not advanced to the stage of settled rules in either domain. It is believed that there is a general readiness of States to admit that any such use or diversion or interference by one riparian State injuring the free navigability of navigable international waterway to the detriment of a co-riparian States is a breach of International Law.

Reference may also be made to Article 3 of the Charter of Economic Rights and Duties which provides ; "In the exploitation of natural resources shared by two or more countries, each State must cooperate on the basis of a system of information and prior consul-

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tations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

In contiguous rivers, there must be a bilateral agreement for the purposes of making the exploitation of the waters. In rivers of successive course, each State can utilise the water of the river according to its need. But this charter could not come in force as there was a disagreement among the States as to its content and scope.

The Farakka issue :—

India constructed Farakka Barrage on the river Ganga to save the port of Calcutta. Bangladesh alleged that India had unilaterally interrupted the flow of the water and the dispute was settled on September 30, 1977 through a bilateral agreement. India went a longway to accommodate the interest of Bangla Desh. Some members of Parliament criticised the agreement as sell out of national interest by India. Thus, India followed the Halsinki Rules in letter as well as spirit although she was neither one of the participants of the Halsinki Summit nor one of the parties who signed the Finant Act that emerged after the conference.

(h) Inter-Oceanic Canals—Canals which are inland waterways are part of the territory of the territorial States, through which they pass, and by analogy are subject to the rules as to the rivers.

As to inter-oceanic canals special treaty rules are applicable to the Suez, Panama and Kiel canals. Let us discuss these canals in a greater detail-

The Suez Canal.—The most important inter-oceanic canal is the Suez, 101 miles long which connects Red Sea with the Mediterranean Sea. It was opened for navigation in 1869. The Suez Canal Company, with headquarters in Paris, was an Egyptian registered company with a majority of foreign shareholders. Britain was the largest shareholder in it. The 99-year concession granted to the company to levy fees on all ships passing through was due to expire on 17th November, 1968 when the ownership of the canal would have reverted to the Egyptian Government.

Under the Convention of Constantinople, signed in 1888, the Canal was exempted in perpetuity from blockade and all vessels, whether armed or not, must be allowed to pass through in peace and war. The Anglo-Egyptian Treaty of 1954 provided for the withdrawal of British forces from the Suez Ganal Zone, as originally suggested by the British Labour Government in 1946. The U. K. was given the right to reoccupy the zone in the event of any attack on the Arab State or Turkey, while British firms, under the super-

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vision of a government committee in London were allowed to maintain the military base in working order.

In July 1956, the Egyptian Government nationalized the company, stating that the resulting revenue would be used to build the Aswan Dam. It thereupon became an important question as to how far the free rights of the States to use the canal might be impaired in future. The controversy resulted ultimately in the Anglo-French Invervention against Egypt in the Canal Zone in October-November. 1956.

There is preponderant opinion to the effect that the rights to use the canal are not dependant on the former concession, nor exercisable only on sufference by Egypt, but are vested rights of an International character, guaranteed by international law. Reference may be made apart from 1888 Convention to the Anglo-Egyptian Agreement of October, 1954, under which the parties recognized that the canal was "a waterway economically, commercially and strategically of International importance" and to the principles approved by the United Nations Security Council on October 13, 1956 that freedom of passages should be maintained "without discrimination overt or covert" that the canal be "insulated" from the politics of any country and that tolls and charges should be fixed by agreement. Egypt's declaration in April 1957, regarding conditions of the future use of the canal has, however prevented the issue from becoming clarified—*Starke's* "An Introduction to International Law, Fifth Edition, p. 172.

Subsequently, an agreement was concluded whereby it was agreed that Suez Canal will remain free from international politics and all the States shall have the right of shipping over this Canal. However, the State of Egypt shall be entitled to realise taxes for its use. During Arab Israel conflict, the canal was closed. In 1975, it was again opened for navigation.

The Kiel Canal.—Next in importance comes the Kiel Canal connecting the Baltic Sea with the North Sea. This canal lies within the territory of Germany which constructed it. Though open to vessels of all nations Germany held the control of navigation on the Kiel Canal before the first World War. The Treaty of Peace with Germany provided that "the Kiel Canal and its approaches shall be made free to the vessels of commerce and of war of all nations at peace with Germany on terms of equality." The Permanent Court of International Justice, interpreting this provision held in *Wimbledon* —The S. S. Wimbledon, Pub. P L I J. (1923) Series A. No. 1. pp. 25, 28—that the Kiel Canal was open to the vessels of the States which though at peace with Germany were involved in a war in which Germany was neutral. Germany denounced the Treaty of Peace in 1936 without evoking any protest from the majority of the signa-

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tories of that Treaty. The result was that in 1937 the German Naval Command made it obligatory for the vessels of other States to obtain permission before entering the Kiel Canal. After the Second World War, the position has changed and this canal was thrown open to all the States.

The Panama Canal.—The *Clayton Bulwer* Treaty of 1850 which was concluded between Great Britain and the United States of America provided that the canal when built will be protected by the contracting parties and will be open and free for all. This treaty was however superseded by the *Hay Pauncerfote* Treaty of 1901 between Great Britain and the United States of America which provided for the construction and management of the Panama Canal by the United States and which gave an International status to the canal. It was agreed that the Panama Canal was to be free and open to the vessels of commerce and of war of all nations, it was never to be blockaded and no act of hostility was to be committed within the canal area. The United States was granted the right to maintain such police force along the Canal as was necessary.

In 1903, *Hay Varilla* Treaty between the United States and the Republic of Panama led to the construction of the Panama Canal. The Republic of Panama granted to the United States land for construction of a canal from Colon to Panama with right to protect and manage the canal after it had been built. This treaty further provided that the canal when built shall enjoy perpetual neutrality and shall be open to vessels of all nations. The Panama Canal was opened in 1918. It is open to the vessels of commerce and of war of all nations under the rules framed in that behalf.

Q. 55. State the rules of International Law relating to—

(a) the 'contiguous zone' (I. A. S. 1960 ; P. C. S. 1964).

(b) Straits ;

(c) Gulf and bays, and

(d) Exclusive economic zone.

Ans. (a) 'Contiguous zone'.—It has become difficult to maintain that the three-mile limit of territorial waters is a definite rule of law, for many States claim a wider zone, sometimes very much wider zone. Many States too claim to fix different zones for different purposes, and in such cases it is not always easy to know whether a State is claiming a wider area of territorial waters, that is to say, of waters under its sovereignty for all purposes, or merely a certain special right over an adjacent area of high seas. The high seas area over which these special rights are often claimed is known as the "Contiguous Zone", and the rights have been claimed for variety of purposes.

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Geneva Convention on the Territorial sea and Contiguous Zone, 1958, provisioned that the coastal State may exercise the control over the Contiguous Zone to :—

(a) prevent infringement of its customs, fiscal immigration or sanitary regulations within its territory or territorial sea ;

(b) to punish infringement of the above regulations committed within its territory or territorial sea.

According to this convention the Contiguous Zone should not extend beyond the twelve miles, from the base line from which the territorial sea is measured. But most of the States have agreed upto 24 nautical miles which has been laid down in the informal Single Negotiating Text. In case of the opposite and adjacent States, as the convention provides, the Contiguous Zone shall not extend beyond the median line.

According to Article 33 of the *U. N. Convention on the Law of the Sea*, 1982, in a zone contiguous to its territorial sea, the coastal State may exercise the control necessary to (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea ; (b) punish infringement of the above regulations committed within its territory or territorial sea " Thus the contiguous zone imposes certain restrictions on the freedom of the high seas. Further contiguous zone may not extend beyond 24 nautical miles baseline from which the breadth of the territorial sea is measured.

Indian position :—

According to the territorial waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 the Contiguous Zone of India shall not extend beyond the 24 nautical miles from the base line from where the territorial sea is measured.

(b) Straits —The rules as to the maritime belt considered above are partially applicable to Straits. Clearly the waters of straits of a width less than six miles dividing the territory of one State are territorial ; and if straits of such a width divide the territory of two States, the waters thereof are territorial, and the line of division will normally run down the middle. Controversy arises where the width of the straits exceeds six miles. Some writers hold that such waters are territorial, others do not. Besides, there is the case of certain straits which have along been through general acquiescence of State, as having a territorial character, for example, the Straits of Juan de Fuca, which is about fifteen miles wide, and which is divided between the littoral States, Canada to the north, and the United States to the south.

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The Third U. N. Conference on the Law of the sea is trying to codify the law relating to straits used for International navigation.

In *Corfu Channel* case (1949), the International Court of Justice held that States in time of peace have a right to send their ships through used for International navigation between two parts of the sea without the previous authorisation of a coastal State, provided that the passage is innocent. The same rule has been adopted in the U.N. Convention on the Law of the Sea, 1982 As regards straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Articte 38 of the convention provides that all ships and aircraft shall enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the straits and its mainland, transit passage shall not apply if there exists sea ward of the Island a route through the high seas or through an exclusive economic zone of similar convenience with respect navigational and hydrographical characteristics.

(c) Gulfs and Bays —Article 7 (2) of the Geneva Convention on the Territorial Sea and the Contiguous Zone defines a 'bay' as well as marked indentation whose penetration is in such proportion to the width of its mouth as to contain land locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however be regarded as a bay unless it is as large as or larger than that of semicircle whose diameter is a line drawn across the mouth of that indentation.

Where the distance between the low water marks of the natural entrance points of a bay exceeds 24 miles, a straight base line of 24 miles shall be drawn within the bay in such manner as to enclose the maximum area of water that is possible with a line of that length. It may be noted here that Article 7 as noted above, applies only to bays the coast of which belong to a single State. It therefore, leaves a room for State to establish sovereign claims to the water of bays under historic title.

Historic waters.—In the *Fisheries case*, (See the anewer to Q. No. 53) the International Court of Justice defined historic waters in the following words, "Historic waters are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic waters." The doctrine of historic bays gradually emerged during the 19th century as the freedom of the high seas principle became established as fundamental rule of international law. The concept historic waters therefore is a regime of exception to the general rules of law relating to the delimitation of the maritimes domain of a State.

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Indian position.—Section 8 (1) of the Territorial waters and continental shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 provides that the Central Government may, by notification in the Official Gazette, specify the limits of such waters adjacent to its land territory as are the historic waters of India. Section 8 (2) further provides, the sovereignty of India extends and has always extended to the historic waters of India and to the sea-bed and sub-soil, underlying and the air space over such waters. The Central Government through notification dated 15 January, 1977, notified the limit of historic waters of Indian Pak Strait and Pak ay and Gulf of Mannar. The notification further provided the historic waters of India in Pak Strait and Pak Bay area of sea are internal waters of India. The historic waters of India beyond the appropriate base line referred to in Section 3 (2) of the Act. in the Gulf of Mannar area of sea have the same status as the territorial waters of India.

The non-territorial gulfs and bays are open in time of peace and war to vessels of all nations including men of war. The littoral State is however competent to reserve the right of fishery in territorial gulfs and bays for its own subjects.

The Notification, dated 15 January, 1977 notified the limits of the historic waters of India in Pak Strait and Pak Bay and Gulf of Mannar.

(d) Exclusive Economic or Patrimonial Sea.—For the first time in Januaty 1971, Kenya in the Asian-African Legal Consultative Committee at its Colombo Session advocated the concept of economic zone. Later on Kenya submitted the draft of exclusive economic zone concept in Geneva Session on the U. N. Sea-bed Committee. The draft provided that all States shall have the right for the benefit of their people to establish exclusive economic zone beyond the territorial Sea for the purpose of exploration and exploitation. The limit of the zone shall be fixed, at 200 nautical miles which take into consideration of the resources of the region and the rights and interest of the developing, land-locked, shelf locked States, within the region.

The second main committee of the Third United Nations Conference on the Law of the Sea held at Geneva in April 1975 prepared a single negotiating text which provides :

1. In an area beyond the adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has :—

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether renewable or non-renewable, of the Sea-bed and sub-soil and the superjacent waters.

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(b) exclusive rights and jurisdiction with regard to the establishment and use of artificial islands installations and structures.

(e) exclusive jurisdiction with regard to—

(i) Other activities for the Economic exploitation and exploration of the zone, such as, the production of energy from the water, current and winds, and

(ii) scientific researches ;

(iii) Jurisdiction with regard to the preservations of marine environment, including pollution, control and abatement.

(iv) other rights and duties provided in the present conventions.

2. In executing its rights and performing its duties under the present convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States.

The convention further provides that it shall not extend beyond 200 nautical miles.

The concept of the exclusive economic zone differs from the continental shelf and the exclusive Fisheries zone. It differs from the former in that it extends to the living and non living resources in the area of the sea, the outer limits of which are measured by distances rather than by depth or exploitability. It differs from the latter in so far as it adopts an uniform approach to all resources living and non-living. thereby ignoring the functional differences between two kinds of resources.

A reference may also be made to the results of the Sixth Session of Third U.N. Conference on the Law of the Sea held from 23 May to 15 July, 1977 which prepared the Informal Composite Negotiating Text. This text will be the basis of negotiations and the 1978 session conference.

Article 55 of the U.N. Convention on the Law of the Sea 1982, provides that the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in the Part V, under which the rights and jurisdictions of the coastal State and freedoms of other States are governed by the relevant provisions of the convention.

Article 56 and 58 deal with rights and duties of a coastal State and other States in the exclusive economic zone.

As per Article 55, in the exclusive economie zone, the coastal State has sovereign rights of exploring and exploiting, consuming

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and managing natural resources. In exercising its rights and performing the duties in the exclusive in economic zone, the coastal state shall have due regard to the rights and duties of other states. As regards breadth of the economic zone, Article 76 of the convention provides that it shall not exceed beyond 200 nautical miles.

As regards the rights and duties of other states, Article 58 says that all other states whether coastal or land locked shall enjoy the freedoms of navigation and overflight and of the laying submarine cable, and pipelins and other internationally lawful use of the sea related to their freedom such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compalible with other provision of this convention.

Indian Position :

Section 7 of the Territorial waters, Continental Shelf and other Maritime Zone Act, 1976 lays down that the exclusive Economic Zone of India is an area beyond and adjacent to the territorial waters. and the limit of such zone is two hundred nautical miles from the base line from where the territorial sea is measured.

Q. 56. Present a short essay on the freedom of the open sea and point out therein the position in regard to (a) the surface of the bed of the Open Sea. and (b) the subsoil beneath the bed of the Open Sea. (I.A.S. 1960, 1964, 1968 ; P.C.S. 1970, 1971, 1973, 1975 and 1980).

A. Freedom of the Open Sea.—The open sea does not belong to any State. Every State has a right of passage over the open sea and every State is entitled to exercise its jurisdiction on board its own ships. According to *Oppenheim*, the open sea is 'the coherent body of salt water all over the greater part of the globe with the exception of the maritime belt and the territorial straits, gulfs and bay which are part of the sea'. We may however in the light of the *Anglo-Norwegian Fisheries Case* define the open sea as all parts of the open sea which are not—(a) the territorial sea, or (b) internal waters, i. e., waters within the base lines of the territorial sea. At first navigation on the high seas was open to everybody but in the fifteenth and sixteenth centuries, powerful maritime States claimed to exercise sovereignty over specific position of the open sea. Thus, Portugal claimed maritime sovereignty over the whole of the Indian Ocean and a very great proportion of the Atlantic. Similar claims were made by Spain over the Pacific and the Gulf of Mexico and by Great Britain to the Narrow sea and the North sea.

Grotius objected to these extensive claims to sovereignty on

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two grounds :—(1) The ocean cannot be the property of a State because no State can effectively take it into possession by occupation. (2) Nature does not give a right to any body to appropriate things that may be used by everybody and are inexhaustible—in other words the open sea is a *res gentium* or *res extra commercium*. Now the term "the freedom of the open sea" signifies (a) that the high seas can never be under the sovereignty of any particular State ; (b) that there is absolute freedom of navigation on the high seas for vessels of all nations whether merchantmen or warships ; (c) that in general no State can exercise jurisdiction over ships within the sea not bearing its flag ; (d) that a State may as general rule, exercise jurisdiction over a particular ship only be virtue of the maritime flag under which that ship sails ; (e) that every State and its citizens are entitled to make use of the high seas for laying submarine cables not oil pipelines (the so called *'freedom of immersion'*) for the conduct of fisheries, and for scientific and technicel purposes ; (f) that there is absolute freedom of flight above the open sea for all aircrafts—*Starke's* "An Introduction of International Law" 4th Ed., p. 209.

Limitation to the freedom of Open Sea.—Freedom of open sea is conditioned by the following facts :

1. A foreign merchantman violating the laws in the territorial water of another State may be pursued by the littoral State on the open sea and seized for a trial.

2. Every State has a right to seize and bring to trial a foreign vessel illegally sailing under its flag.

3. A belligerent State has right of visit and search of the neutral ships on open sea.

4. A belligerent State has a right to seize neutral merchantmen for breach of blockade and for charge of contraband.

5. Every State has a right to seize piratical vessels.

(a) Surface of the bed of the Open sea.—The controversy with regard to the surface of the bed of the open sea, whether it is *res nullius* or can be effectively appropriated by State or States, is yet unresolved. *Grotius* adhered to the view that the surface of the bed of the open sea cannot be exclusively claimed by any State. This view, however, has been untenable by the modern jurists. *Sir Cecil Hurst* subscribed to the view that the claim to the exclusive ownership of a portion of bed of the sea and to the wealth which it produces in the form of pearls, coral, sponges or other fructus of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas. Oppenheim also holds the same view.

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In 1970 the General Assembly of the U N.O. has passed a Declaration containing the principles governing the deep sea floor. It is proposed that the resources of this area may be exploited by International regime and may be equitably distributed among the nations of the world.

(b) The position of the sub-soil beneath the bed of the Open Sea.—*Lauterpacht* in Oppenheim's International Law (Vol. 1, 8th Ed.) lays down the following rules :—

(1) The *Sub-soil beneath the bed* of the high seas can be acquired and appropriated by a coastal State only, and if the right is conferred on every State, constant friction and lawlessness might occur that would be inconsistent with the freedom of navigation of the open sea ; the right therefore should appertain to the littoral State as an exclusive privilege.

(2) The littoral State may construct a tunnel or a mine on the sub-soil beneath the bed of the territorial belt and drive it into sub-soil of the sea bed, up to the boundary line of sea bed of the maritime belt (but not further) of another State, for the transgression of that dead line would mean an encroachment on the jurisdiction of the latter State.

(3) This occupation of a opinion of the sub-soil beneath the sea-bed should not in any way be inconsistent with the fundamental principle of the freedom of the open sea and its free navigation by all States ; nor the occupier State should use its right in a manner or to make such arrangements in the part of the sub-soil subversive to the above International right of all States.

Q. 57 What are the rules of the International Law relating to continental shelf ? Do you consider the recent proclamations made by various States consistent with these rules ? (I A.S. 1956, 1960 1978 : P.C S. 1964, 1974 ; C.S.E. 1988).

A. Continental shelf—*Sir Cecil Hurst* defines continental shelf as follows :—"The sea-bed in general on the seaward side of low-watermark shelves gradually—not suddenly or precipitiously, but slowly so that a considerable distance sea-wards will have to be traversed before one reaches very deep water. It is the sub-soil below this shelving area which is known as the continental shelf." *The International Law Commission* defines it as a part of the sea-bed, continuous to the coast, but outside the areas of the marginal seas where the depth of the superjacent waters allow the exploitation of the natural resources of the sea-bed and sub-soil, of similar submarine area adjacent to the coast of Island. The first important thing is to be noted in the definitions is that, it rejects the view that the doctrine justifies claims to vast off shore areas regardless

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of the depth or exploitability or that it endeavours a coastal State to exercise unlimited jurisdiction over the waters above shelf. In the words of *Starke*, "What is commonly meant by the 'Continental Shelf' in particular by mineralogists, is the sub-merged bed of the sea contiguous to a continental land mass, but not situated at a greater depth beneath the sea level than one hundred fathoms or six hundred feet". The President of the United States declared by proclamation in September 1945 that the United States Government regarded "the natural resources of the sub-soil and the sea bed of "Continental Shelf' contiguous of the United States Coast as subject to its "jurisdiction and control". This assertion of right was expressly stated not to affect the character of the waters above as high seas, or the right of free navigation in these waters. The claim of the United States was communicated to other interested powers who raised no objection. Similar declarations were made by Mexico in October 1945. Argentina in October 1945, Chile in June 1947, Peru in August 1947 and Costa Rica in November 1949. It may be noted that instead of giving a definite form and certainty to the international law relating to the Continental Shelf, the definition adopted in the said convention has made the matters more complicated. The definition of Continental Shelf in Article 1 of Geneva Convention is ambiguous and inadequate.

These claims involve an extension of jurisdiction or sovereignty beyond the territorial sea Lauterpacht in *British Book of International Law*, 1950, p. 385, has cogently argued that the claims in respect of the continental shelf are inherently reasonable and should not be confined to shelf itself, but should be admitted in respect of submarine areas generally, wherever applicable. The declarations by some States (for example, Chile) embrace such submarine area beyond the continental shelf, and according to the International Law Commission of the United Nations, the right of Coastal States to exploit such areas, if there is in fact no Continental Shelf, ought reasonably to be acknowledged.

In the Third United Nations Conference on the Law of the Sea, consensus has emerged in favour of the 'natural prolongation theory'. In the informal Single Negotiating Text defined it as comprising, "the Sea-bed and sub-soil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured"

Mention may also be made of the final Draft Articles on the Continental Shelf drawn up by International Law Commission of the United Nations. *Report on the Work of the Commissions. Eigth Session* (1956), referring to Articles 67-73. These articles however

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are not the final enunciations of the rules of international Law. They provide —(a) that the Coastal State may exercise "Sovereign rights" over the Continental Shelf for the purpose of exploring and exploiting its natural resources (including non-mineral as well as mineral resources), thereby revising previous and favouring the attribution to coastal States of new extensive rights over sedentary fisheries ; (b) that the status of the superjacent waters as high seas, and the status of the air-space above such waters as are unaffected ; (c) that the establishment or maintenance of submarine cables is not to be prevented ; (d) that navigation or fisheries should not unjustifiably be interfered with ; (e) that any necessary installation in the shelf, which may not be established in narrow channel or recognized sea-lanes, are not to have the status of islands, although safety zones of limited extent may be established around them ; (f) that due notice of constructions, and due means of warning must be given of such installations and (g) that where two or more States are contiguous to the same continental shelf, the boundary of division is, in the absence of agreement or special circumstances, to be determined according to the principle of equidistance from the base-lines from which the breadth of the territorial sea is measured.

Recently U.N. Convention on Law of Sea, 1982, in its para 4 of Article 76 provides—For the purposes of this convention the coastal state shall establish the outer edge of the continental margin whenever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by either—

(i) A line delineated in accordance with para 7 by references to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope ; or

(ii) A line delineated in accordance with paragraph 7 to fixed points not more than 60 nautical miles from the foot of the continental slape.

After having provided the above method of establishing the outer edge of the continental margin, the convention on the Law of Sea, lays down the formula for fixing the precise limits of the continental shelf of a coastal state in paragraph 5 of Article 76, as follows :—

"The fixed points comprising the line of the outer limits of the continental shelf on the seabed drawn in accordance with paragraph 4 (a) (i) and (ii) either shall not exceed 350 nautical miles from the base lines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2500

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metres isoboth, which is a line connecting the depth of 2500 metres.

A. In the North Sea Continental Shelf Cases (1969) I.C.J., the World Court observed: "The rights on the Coastal State in respect of the areas of the Continental Shelf that constitutes of natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploiting the sea-bed and exploiting its natural resources. In short, there is lease an inherent right."

B. Where the Continental Shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, in the absence of any agreement, the boundary is a median line every point of which is equidistant from the nearest points of the baselines from which the depth of the territorial sea is measured.

C. Continental Shelf (Tunisia/Libyan Arab Republic) [Judgment of I.C.J. of 24th Feb. 1982]. In this case the I.C.J. was requested in 1978 to determine what principles and rules of International Law were applicable to the delimitation as between Tunisia and Libyan Arab Jamahuriya of the respective areas of continental shelf appertaining to each. The Court considered arguments as well as evidence based on geology, physiography and bathymetry on the basis of which each party sought to claim particular areas of the sea bed as the natural prolongation of its land territory and concluded in its judgment of 24th February, 1982 that the two countries abutted on a common continental shelf and that physical criteria were therefore of no assistance for the purpose of delimitation. Consequently, it has to be guided by "equitable principles" and by certain factors such as the necessity of ensuring a reasonable degree of proportionality between the areas allotted and the lengths of the coastline concerned, but the application of the equidistance method could not, in the particular circumstance of the case, lead to an equitable result. With respect to the course to be taken by the delimitation line, the Court distinguished two sectors near the shore, it considered having taken note of the some evidence of historical agreement as to the maritime boundary, that the delimitation should run in a north-easterly direction at an angle of 26^0 ; Further seawards, it considered that the line of delimitation should near eastwards at a bearing of 52^0 to take into account the change of direction of the Tunisian coast and the existence of the Kerkennah islands.

Libyan Arab Jamhuriya Malta. (I C.J. 1985). This is the latest case on the point in which the court was asked to decide as to what principles and rules of International law are applicable in

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the delimitation of the areas of the continental shelf which appertains to Malta and the area of continental shelf which appertains to Libya and how in practice such principles and rules can be applied by the two parties in this particular case in order that they may without difficulty dealing such areas by an agreement.

Both the parties have signed the 1982 U.N. Convention on the Law of the Sea but it has yet not entered into force. The parties agreed that the dispute is to be governed by customary International Law. As regards the U.N. Convention of Law of sea, the International Court of Justice observed that even independently of the reference made it is the duty of the court to consider in what degree any of its provisions are binding upon the parties as a rule of customary international law. The court observed by referring Art. 76 of the convention.

That the question of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other are not only distinct but are also complimentary is self evident. The legal basis of that which is to be delimited and of entitlement to it, can not be other than pertinent to that delimitation.

Lastly the court while taking into consideration the reference of convention, 1982 and its observation in its previous judgment of Tunisia-Libyan Arab Jamahuriya, 1982, laid down following principles for the delimitation :—

(1) The delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result.

(2) The area of continental shelf to be found to appertain to either party not exceeding more than 200 miles from the coast the party concerned, no criterion for delimitation of shelf areas can be derived from the principles of natival prolongation in the physical sense. Further, an equitable result may be arrived at by drawing, as a first stage in the process a median line every point of which is equidistant from the low water mark of the relevant coast of Malta (excluding the islet of Filfa) and the low water mark of the relevant coast of Libya.

Indian Position.

Indian Parliament enacted the Territorial Water, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 which provides that the continental shelf of India comprises the sea-bed and sub-soil of the submarine areas that extend beyond the limits of its territorinl waters throughout the natural prolongation of its land to the territory to the outer edge of the continental

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margin or to a distance of two hundred nautical miles from the base-line where the outer edge of the continental margin does not extend upto that distance.

Q 58. What are the various theories regarding air space over occupied land and waters ? Indicate also the present position in International Law of aerial navigation. (I.A.S. 1957).

A. Air space.—On account of the importance of air ships the air space has come in for controversy and different theories exist with respect to supremacy over the air-space. Before the First World War, the only point on which there was universal agreement was that the air space over the open sea and over unappropriated territory was absolutely free. As to the air space over occupied land, over waters subject to State sovereignty, the following theories were held—

(1) to the territorial sea there belongs absolute sovereignty over the whole space or atmosphere above its territory to an unlimited height with the consequent right to forbid visitation by foreign aircraft ;

(2) The superjacent air space is absolutely free and open on the analogy of the freedom of the seas ;

(3) Adopting the analogy of the relationship between the maritime belt and the open sea, territorial sovereignty extends only up to a specific height of the air space, the remaining portion being ownerless and free ;

(4) a theory qualifying the last theory by permitting the superjacent territorial State to protect its interests by imposing regulations on passing foreign aircraft even above the proprietary limit, though this upper portion is still to be deemed unappropriated by any State ;

(5) the air space is under the sovereignty of the subjacent territorial State subject to servitude or easement of innocent passage for foreign civil aircraft, foreign military aircraft being excluded from this privilege.

It is clear from the above view or theories that there is great controversy in the International field in regard to the law relating to airspace. One thing is however definite that each State exercises complete control and sovereignty over the lower portions of the air space and the aircraft of no other State can enter in its territory without seeking its prior permission. So far as the question of outer air space and up to unlimited height is concerned, there is great controversy and much depends upon the capacity of the State concerned. So there is an urgent need of evading definite rules of International law in this connection.

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Aerial Navgiation.—A number of international treaties have been concluded in regard to aerial navigation. The more important of them are given below :

Aerial Navigation Convention of Paris (1919).—This Convention attempted to lay down rules for aerial navigation in times of peace but did nothing to regulate navigation through air spaces during War. The following principles were expressly declared in the instrument :—

(1) The territorial State has absolute sovereignty over its air space. According to Article 1 :—

> "The contracting States recognize that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters."

(2) In peace-time, freedom of innocent passage is to be accorded to aircraft of the parties to the Convention, subject to their observance of the conditions laid down therein (Article 2). But regular international air lines or air services have no such rights without the consent of the State flown over (Article 15).

(3) No aircraft is to be registered in a country unlsss it belongs wholly to the nationals of the country.

Military aircrafts are not to fly over or land in the territory of another State without authorisation. The convention also provided for the establishment of an International Commission of Air Navigation under the direction of the League of Nations.

Havana Convention.—The above Convention did not apply to certain American States including the United States of America but these became party to the Havana Convention of 1928 on Commercial Aviation, containing similar provisions. The Havana Convention differed from the Convention of 1919 in being primarily a commercial agreement in containing no annexed technical regulation, and in not establishing an international organisation.

Warsaw Convention (1929).—This Convention for the unification of certain rules regarding International Air Transport was signed at Warsaw on October 12, 1929. The object of the Convention was to bring uniformity in the rules regulating to the conditions of International carriage by air with regard to documents of carriage and the responsibility of the carrier. It laid down elaborate rules with regard to passengers of the aircraft, luggage carried by aircrafts and liability of carriers.

Chicago Convention on International Civil Aviation Conference (1944).—It would appear that the Convention of 1919 did not settle all the problems connected with aerial navigation. While the Second

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World War was still going on, representatives of fifty-four States met at Chicago at a Conference for the purpose of laying down rules for the regulation of Civil Aviation. The Convention of Civil Aviation which was adopted at this Conference is described as the 'Constitution for the post-War Global air World, and is an improvement on the Convention of 1919. This Convention came into force in April 1947 and had become binding on fifty-three States by August 1947. It reaffirms the principle that a State has extensive sovereignty over the entire air space over its territory. It provides for comprehensive rules regulating Civil Aviation. Some of the important provisions of the convention :

(a) Contracting State recognize that every State has complete and exclusive sovereignty over the air space above its territory.

(b) The territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

(c) Convention shall be applicable only to civil aircraft and not to the State-aircraft used in military and police service.

Q. 59. (a) Discuss the Five Freedoms of the Air. To what extent are they observed by Powers ? (I.A.S. 1954, 1973, P.C.S. 1969, 1976).

(b) Write critical note on the abuse of air space. Is it illegal to conduct thermo-nuclear experiments in the air ?

A. (a) Five freedoms of the air.—The prodigious increase in transcontinental and inter-oceanic aviation following on technical developments both before and during the Second World War, raised new problems as to freedom of all transit and landing rights of international airlines. States operating regular International airlines which did not possess convenient air strips in other parts of the world naturally clamoured for such rights as against States which did have these landing grounds. Also as between States which desired to their own airlines, even to distant countries, problem arose of the allocation of air traffic. These and allied questions formed the subject of an International Civil Aviation Conference which met at Chicago in November, 1944. The Conference declared the following 'Five Freedoms of the Air', namely the rights of the airlines of each State to :—

(1) fly across foreign territory without landing ;

(2) freedom to land for non-traffic purposes ;

(3) disembark in a foreign country traffic originating in the State of origin of the aircraft ;

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(4) pick up in a foreign country traffic destined for the State of origin of the aircraft ;

(5) carry traffic between two foreign countries.

The proposal of the "Five Freedoms" was fostered by the United States, the most powerful orator State. But no unanimous enthusiasm was shown at the Conference for making these freedoms part of the law of nations. Only the first two "Freedoms" appeared to have obtained support of a majority of States represented. Accordingly, the Conference was constrained to draw up two Agreements :—(a) The International Air services, Transit Agreement providing for the first two "Freedoms," namely, flying without landing, and landing rights for non-traffic purposes in foreign territory. Subject to the provision of this Agreement, a State party might designate the route to be followed in its territory, and the air-ports which could be used, (b) the International Air Transport Agreement embodying all "Five Freedoms". States parties to this Agreement might refuse to the aircraft of other States access to the internal air traffic within their territory.

Case of banning of Pakistani air flights through Indian territory. —In 1971, the Government of India banned Pakistani air-flights through Indian territory. Pakistan lodged a complaint with the International Civil Aviation Organisation and contended that the action of the Government of India was illegal and unjustified. India filed a case in the International Court of Justice and contended that International Civil Aviation Organisation has no jurisdiction to hear the complaint of Pakistan. By majority of 14 votes to 2, the International Court of Justice held the Council of I. C. A. O. to be competent to entertain the application and complaint laid before it by Government of Pakistan on March 3, 1971 and in consequence rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respect.

(b) Abuse of the Air Space.—Now we come to the problems of abuse of the air space, which may in the near future become practical ones. Already, so far as radio-communications are concerned, two principles are emerging :—(a) that every State has a right to prevent its air space being traversed by injurious transmissions of radio waves, (b) that every State is under a duty not to allow, and to prevent its territory being used for the transmission of radio waves injurious to other States. Other modern technological developments appear to require some principles for the protection of the States from injury through the air space ; for example, States by the use of rain-making devices in their air space may deprive adjacent State of the benefit of rain-bearing clouds, thereby causing a drought, or again by the use of atomic energy

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for certain purposes, may cause dangerous radiations affecting the air or clouds above the territory of neighbouring States. In this connection, although no State is an insurer for neighbouring States against damage to the air space, there is probably a duty not to cause gross or serious damage which can be avoided, and a duty not to permit the escape of dangerous objects. To what extent such duties apply to thermo-nuclear experiments, which may produce dangerous radio active "fallout", is still a matter of controversy.

Q. 60. Discuss the provisions of International Law regarding the outer space. Refer to the recent developments in this field. (I.A.S. 1960, 1964 ; P.C.S. 1964, 1974).

A. The General Assembly established an *ad hoc* committee on peaceful use of outer space. On the same subject, the Assembly passed several resolutions entitling 'declaration of legal principles of governing'. The Activities of States in the Exploration and use of outer space, which was unanimously adopted by the General Assembly is very important, particuiarly because most of its principles were incorporated in the treaty of principles governing the Activities of States in the exploration and use of outer space including the moon and other celestial bodies, 1966 (hereinafter referred as "the outer space of treaty"). Thus, Outer Space Treaty, 1966 was concluded in this convention. The provisions of which are as under :—

(1) Outer space, including the moon and other celestial bodies shall be free for exploitation and use by States.

(2) There shall be no national appropriation of outer space, including the moon and other celestial bodies by the claim of sovereignty.

(3) The States shall not place any objects carrying nuclear weapons or any other kind of weapons of mass destruction in orbit around the earth.

(4) The moon and other celestial bodies shall be used by the States only for peaceful purposes.

(5) State parties to the treaties shall bear International responsibility for national activities in outer space.

(6) A State party to the Treaty on whose registry an object launched into outer space carried shall retain jurisdiction and control over such object and over any personnel thereof, while in outer space or on a celestial body.

The U.N. General Assembly adopted another Convention in 1974, which provides that when a State is launching a space object

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into Orbit, the launching State shall register the space object by means of an entry in an appropriate registry where it shall maintain and shall inform to the Secretary-General of U. N. of such entry.

'As the number of space rockets and orbiting satellites that have been launched by the United States and Soviet Union is considerable, there are now substantial grounds for assuming general acceptance of the principle that at some point territorial sovereignty in air space and another legal regime begins under which flight like navigation on the high seas is in practice free to all'. The question of the legal regime to be applied in outer space is not free from difficulty. Various criteria have been suggested by the writers and jurists. One suggestion is that the upper limit of air should be the limit of the earth's atmosphere which may be anything between 500 and 18,000 miles according to the amount of gaseous content of the atmosphere The next criterion suggested is that it comprises the limit of possible flight, for instrumentalities dependent on air or gas for their flight, that is maximum of about twenty-five miles. On 12 December, 1977 the Assembly decided to enlarge the membership of the committee on peaceful uses of outer space from 37 to 47 (Resolution 32/169 B). The legal sub-committee of the committee on the Peaceful Uses of Outer Space held its 17th Session from 13 March to 7th April, 1978. It discussed the legal aspect, the possible hazards of nuclear powered stabilities and priority attention was given to drafting a Moon treaty, principle concerning direct television broadcasting from satellites and the legal implications of remote sensing of the earth from space.

Further the committee on the peaceful uses of outer space in its 21st Session which concluded on 7th July, 1978 recommended that U.N. Conference on outer space to be held not later than 1983 and that working group of experts be created to study technical aspects and safety measures relating to the use of nuclear power sources in space.

The fifth landmark is the agreement governing the activities of States on the Moon and other celestial bodies, 1979, wherein it was decided that all activities on the moon including its exploration and use shall be carried out in accordance with the Charter of U.N. and Declaration on Principals of International Law concerning friendly Relations and Co-operation among States. The moon shall be used by all states parties exclusively for peaceful purposes. And its resources are the common heritage of mankind.

The UNISPACE 82 (Vienna conference on the exploration and Peaceful uses of outer space) was held from August 9 to August 22, 1982, the conference reviews the developments in the field of outer space taking place since 1968. The conference appealed the states

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not to increase arms race beyond earth. This appeal was specially directed to states having nuclear capability. A report adopted by consensus asked the states to follow outer space treaty, 1967, which has prohibited use of mass destruction in outer space. But it is unfortunate that the two great powers-U.S.A. and the USSR are lying each other in production of most advanced weapons of destruction in outer space.

Q. 61. (a) Present an essay on "International servitudes". (b) Discuss briefly the doctrine of "Acquired Rights".

Ans. (a) International Servitudes.—The concept of State servitude has been imported from private law into the international order and has produced much confusion. It has been well said, "of all attempts to apply to relations between States conceptions taken from private law, none has caused more confusion or has brought the recourse to analogy into more disrepute than the efforts made to introduce the conception of servitude into international public law. Lauterpacht Private Law Sources and Analogies of International Law, (1927), p 19. The case of the North Atlantic Coast Fisheries Arbitration (1910) is cited as rejecting the theory of the State servitude. *Oppenheim*, however, points out that the Permanent Court of Arbitration was prepared to accept the principle of State servitude but it demanded an express grant to prove the alleged claim to State servitudes. In later case "*The Wimbeldon*" (1923) the Permanent Court of International Justice by a majority did not accept the contention that the right of passage through the *Keil Canal* was a State servitude. —*Fenwick* Cases, p. 526.

Definition.—*Oppenheim* defines State servitude as "those exceptional restrictions made by treaty on the territorial supremacy of the State by which a part of the whole of its territory is, in a certain way made perpetually to serve a certain purpose or interest of another State". *Oppenheim*—International Law, Vol. I, p. 487.

In *Union of India* v. *Sukumar Sen Gupta*, (AIR 1990 SC 1692) Teen Beegha Case, the Chief Justice of Indian Supreme Court Mr. Sabyasachi Mukherjee observed : "Acceptance of servitude does not represent only negation of sovereignty. The term 'servitude' means nothing more than accepted restriction and grant of servitude does not amount to cession."

State servitudes go with the territory and do not exist apart from it.

Kinds of Servitudes—

(i) Affirmative Positive Servitudes.—When a State grants a right to another State or its citizens to perform certain acts on its

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territory or on a part of it, creates a State servitude of the positive or affirmative character.

(ii) Negative Servitudes—According to *Oppenhiem* negative servitudes are such "as to give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways"—*Oppenheim*—International Law, Vol. I, p 492. A right to demand that another State shall not permit entrance of foreign vessels into its ports arises from Negative Servitudes.

(iii) Military Servitudes.—State servitudes which are required to serve military purposes of a State are military servitudes The right to keep troops in a foreign territory amounts to Military Servitudes.

(iv) Economic Servitudes.—Economic Servitudes are those which are acquired for the purpose of commercial interests, traffic and intercourse in general, such as the right of fisheries in foreign territotrial waters, to enjoy the advantages of free zone for customs purpose, or of free navigation on a river, to build a railway on, or lay a telegraph cable, through foreign territory and the like—*Oppenheim*—International Law Vol. I, p. 492.

(b) Doctrine of "Acquired Right."—The current tendency of extending 'coastal States' dominion over maritime areas beyond the former recognized limits has been tempered by widespread support for the doctrine that the "acquired rights" of non-coastal State in such area shou'd not be displaced but be respected on a basis of equality with the coastal State. Illustrations of such "acquired rights," are long-established practices of fishing in the areas over which new sovereign rights are claimed.

The doctrine of "required rights" has been expressly recognised by the International Law Commission in its Reports and in its final Draft Articles of 1956 on the law of the sea. The doctrine has also undergone careful examination by jurists and it would seem therefrom that a non-coastal State may be entitled to such rights, even through the past activities of private individuals, provided these activities have continued for sufficiently long period of time. Considerations of justice and equity support the doctrine: and the equities in favour of the non-coastal State are, of course, stronger, if its citizens have made a vital contribution of the economic exploitation of the area in question, either by capital expenditure or scientific discovery.

Q. 62. Write a short essay on the Criminal jurisdiction in International Law.

Or

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Many States claim jurisdiction and threaten punishment for certain acts committed by a foreigner in foreign country.—Oppenheim.

A. Criminal Jurisdiction in International Law.—International practice on this matter lacks uniformity. It is agreed that a State is competent to deal with any offence committed within its territory. The States may assume jurisdiction over offences committed by its own national abroad. It is, however, not agreed whether a State is competent in any circumstances to punish a foreigner for an act committed outside its territory and therefore, at a time when he was not subject to that State's Criminal Law.

There are three different practices on the matter. Great Britain, the United States and several other countries adhere for the most part to the theory of the territoriality of criminal jurisdiction. This group of States does not admit that a State may punish an alien for a breach of its Criminal Law if the act was committed outside its territory and, therefore, in a place at which that law was not in force. France, Germany and a majority of other States also accept the principle of territoriality but admit cartain exceptions, generally for the acts directed against the security of the State or its financial credit. Lastly, there is a third group of States which includes Turkey and Italy which rejects the territorial theory of criminal competence. Their law is based on the theory that crime, wherever, committed is a social evil which all civilized States are interested in suppressing. In practice, however, these States avoid the anarchy of jurisdictions to which this so called 'Universal' theory of crime might lead by certain concession to the territorial principle, and apply their Criminal Law only to the acts of foreigners committed aboard when these are prejudicial to the State or to one of their own nationals.

Great Britain and the United States, however, though they deny the legitimacy of exception to the territorial basis of criminal jurisdiction over non-nationals, admit that in certain circumstances a crime may be committed within the territory of a State and therefore be justiciable by its criminal courts even though the actor may be physically outside the territory. Thus in *Rex.* v. *Godfrey*, (1923) 1 K. B. 24, an English Court ordered the extradition to Switzerland for trial thereof a man, who being himself in England, was alleged to have procured his partner, who was in Switzerland to obtain goods there by false pretence. In *Ford* v. *United States*, 273 U. S. 593, in 1927, the U. S. Supreme Court upheld the conviction for conspiracy against the United States liquor laws of certain British subjects whose ship was at the time on the high seas.

In *Cutting* Case (1887), Cutting an American citizen was arrested in Mexico for an alleged libel, published in Texas, on a

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Mexican citizen. He was arrested and imprisoned in accordance with the Mexican Penal Code which granted Jurisdiction to the Mexican Courts over offences committed by foreigners against citizens of Mexico. America intervened on the following grounds :

(1) that the Mexican Courts had no jurisdiction ;

(2) that the judicial treatment of Cutting was contrary to the custom prevalent in civilized States.

The case was withdrawn and Cutting was released.

The leading case relating to jurisdiction is that of S. S. Lotus, 1927 P. C. I. J. Series. A collision between the French steam-ship Lotus and a Turkish ship *Boz Kourt* occurred on the open sea. As a result of this collision the Turkish steamship was lost and eight Turkish subjects died. On the arrival of the French steamship 'Lotus' (1927) at Constantinopole, the Turkish Government took criminal proceedings both against the Captain of the Turkish vessel and the French officers of the Lotus both of whom were sentenced to imprisonment. The French Government made a grievance on the ground that Turkey had no jurisdiction inasmuch as the act was committed on the open sea and that it was the flag State which had jurisdiction. Both the States agreed to refer the matter to the Permanent Court of International Justice. The Court held that Turkey had not acted in conflict with the principles of International Law ' because the act committed on board the 'Lotus' produced its effect on board the Boz Kourt under the Turkish flag and therefore on the Turkish territory giving Turkish Court jurisdiction. The Court observed that "International Law does not prohibit a State from exercising its jurisdiction over a foreigner for an act done outside its territory and that the territoriality of Criminal Law..... is not an absolute principle of International Law and no means coincides with territorial sovereignty."

The case of a criminal jurisdiction also came before the Supreme Court of India in *Mobarak Ali* v. *The State of Bombay in* 1957. The Supreme Court in this case observed, "The fastening of criminal liability on a foreigner in respect of a culpable acts or omissions in India which are juridically attributed to him notwithstanding that he is corporeally present outside India at the time, is not to give any extraterritorial operation to the law ; for it is in respect of an offence whose locality is in India that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured."

Illustrations :—

(a) *K*, a British subject, flees across the channel and kills a Frenchman on the shore of France. Both Britain and France have

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jurisdiction over *K*. Britain have a jurisdiction on the ground that *K* is a British subject and the crime was committed within the territory of Britain. France can exercise the jurisdiction on the ground that the crime was completed in the France territory (I.A S. 1970).

(b) *K*, an Indian subject, obtains money for false pretences by means of letters posted in Bhutan to a recipient in Pakistan, *K* can be tried in any one of the three countries. (I.A.S. 1970).

Q. 63. Explain fully the doctrine of ex-territoriality referring also to the decided cases on the subject.

A. Doctrine of ex-territoriality.—"The exercise of jurisdiction by a State over property, persons, acts or events occurring within its territory is clearly conceded by International law to all members of the society of States. This rule, however, is not unqualified and certain exceptions to it are admitted by what had been termed as the doctrine of ex-territoriality. The term ex-territoriality is commonly used to describe the status of a person or thing physically present on a State's territory but wholly or partly withdrawn from the State's jurisdiction by rule of International Law. It introduces a fiction, for the person or thing is in fact within and not outside the territory."—*Brierley* : The Law of Nations (Fifth Edn.) p. 187. This doctrine of ex-territoriality has its foundation upon the principle that it would be offensive to State to have its legal status determined by the courts of a co-ordinate State. Some immunities therefore from the territorial jurisdiction are by International Law or Municipal Law conferred on :

(a) Foreign States and Heads of foreign States.

(b) Diplomatic representative of States.

(c) Public ships of foreign States.

(d) Armed forces of foreign States.

(e) International institutions.

A. Head of the foreign States and Property of the Foreign States.

The Heads of foreign States are immuned from the process of the court, unless he has submitted to the court either adhoc or generally by a treaty. Several principles have been suggested as to its basis :—

(a) Par in parem non habet imperium.—One sovereign power can not exercise jusirdiction over another sovereign power but only over inferiors.

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(b) **Reciprocity or Comity**—In return for a concession of immunity, other States or sovereigns of such States make mutual concessions of immunity within their territory.

(c) The fact that in general the judgment of a Municipal court cannot be enforced against a foreign State or sovereign thereof, so that the attempt to do so would be regarded as one unfriendly act.

(d) The merits of a dispute involving the transaction or policy of a foreign Government ought not to be canvassed to the domestic court of another country.

The Pakistan Government entered into contract with a foreign Government for the purpose of military equipment which provided that its interpretation should be governed by English Law and stated that the Government agreed to submit, for the purposes of the agreement to the jurisdiction of the English Court. When the disputes arose, the Pakistani Government objected to the jurisdiction of the English Court, saying that its waiver was not express, not made in the face of the court, and therefore, effective. The objection of the Pakistan is valid (I.A.S. 1965).

The property of a foreign sovereign is also immuned from the jurisdiction of the court, some of the countries have made the distinction between sovereign and commercial acts. If a foreign sovereign is engaged in the commercial activities, the sovereign is not entitled to get the immunity. According to Friedmann, following views are prevalent :—

(a) All the properties of the State is entitled to immunity.

(b) Another view is that such immunity is subject to the limitations which depend upon the type of the act.

(c) According to the third view, immunity depends upon the nature of the function.

(b) Diplomatic Representatives of Foreign States (I. A. S. 1969, 1963, C. S. E. 1987).

The modern view is that they enjoy the immunity because of the special functions they perform. Prof. Oppenhiem supported this view. This was also affirmed in Ex-parte Petroff (1971) by the Australian Supreme Court.

(c) **Public ships of Foreign State.**—Public ships may be either warships or vessels engaged in some service of a State. A public vessel need not be owned by the State A private vessel employed by a State for its commercial purposes or for governmental activities has a public character and will be a public vessel. The Privy

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Council, in *Chung Chi Cheung* v. *The King*, 1939 A.C. 160, felt no hesitation in rejecting the doctrine of ex-territoriality expressed in the words of *Oppenheim* which regards the public ship 'as a floating portion of the flag State' but which admitting that public ships are entitled to certain immunities it did not find it necessary to consider the precise limits of those immunities.

According to *Fenwick*, public warships and their auxiliaries while on foreign territorial waters are completely exempt from local jurisdiction in respect not only to the internal discipline of the ship but even to crimes committed on board the ship by persons not members of the crew or committed in the port itself by one who has taken refuge on board the ship.

In *Parlement Beldge*. L. R. 5, P. D. 197, the English Court of Appeals laid down the rule that a public owned vessel of the State of Belgium used as a mail packet as well as for general commercial purposes was exempt from suit *in rem* either for recovery of property or for damages for collision.

'The immunity of a public ship.....means not the total exemption from the local law but rather that if she violates that law only proper redress is through diplomatic action and not by judicial process or police action against the ship.

Brierley—The Law of Nation (5th Ed.), p. 191.

(d) Foreign Armed Forces.—Armed forces admitted on foreign territory enjoy a limited but not an absolute immunity from the territorial jurisdiction. The extent of the immunity depends upon the circumstances in which the sources were admitted by the territorial sovereign. The principle was thus stated in *Schooner Exchange* v. *Mc Faddon* :

A State which admits to its territory an armed force of a friendly foreign power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its sovereign."

In other words, the principle is that the territorial or host country impliedly undertakes not to exercise any jurisdiction over member of the visiting force in such a way as to impair the integrity and efficiency of the force.

(e) International Institutions.—International institutions such as the United Nations and the International Labour Organization have been conceded immunity from the territorial jurisdiction both under international agreements and under Municipal law.

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Thus, there is an agreement between the U. N. O. and America according to which the U. N. O. is treated to be outside the jurisdiction of America.

Q. 64. "A ship bearing the national flag of State is for purposes of jurisdiction treated as if it were territory of that State on the principle that it is virtually a floating State." Discuss.

A. Jurisdiction of the flag State and its basis.—Broadly speaking, the relationship between the State and vessel flying is that the latter are parts of the territory of the former. According to *Oppenheim*, it is a customary rule of International Law that men of war and other public vessels of a State while on the open sea and in foreign territorial waters are considered to be floating parts of the flag State only in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction and protection of the flag State. The theory which is sometimes known as the 'floating Island theory' received wide acceptance as the basis of the jurisdiction of the flag State. It was maintained that the vessels enjoyed ex-territoriality on open sea as well as on foreign territorial waters. This fiction of 'ex-territoriality' employed to explain the theoretical basis of the jurisdiction of the flag State over vessels has raised a good deal of controversy. Recent trend of juristic thought is in favour of rejecting the theory simply on the ground that it does not fit in with the totality of relations between the foreign State and its flag State. The fiction of ex-territoriality was rejected by United States Court in *Cunnard Steamship Co.* v. *Mellon*, 226 U. S. 100 (102), wherein it was observed that the jurisdiction of State over vessels sailing under its flag arose out of the nationality of the ship as established by her domicile, registry and use of the flag and partakes more of the characteristics of personal rather than of territorial sovereignty. The "floating Island theory" was pleaded but was rejected in *Chung Chi Cheung* v. *The King*, (1938) A. C 163, where the Privy Council approved of the view that the immunity of the vessel does not depend upon an objective ex-territoriality but an implication of domestic law. It is thus clear that the fiction of ex-territory is inadequate in its scope and the theory that a vessel is the floating portion of the territory of the flag State cannot be accepted. According to *Fenwick* a better basis of jurisdiction might be found in the fact that the jurisdiction of the flag State has been acquiesced in by other Srates. Simply as a matter of mutual convenience.

Brierley rejects the theory thus.—"It introduces a fiction for the person or thing which is in fact within and not outside the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and is misleading because we are tempted to forget that it is only a metaphor and to deduce

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untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from local jurisdiction ; it does not help us to determine the only important question, namely, how far this immunity extends"–*Brierley*–Law of Nations (5th Ed.), p. 187.

Refer also to the next question.

Q. 65. State with reference to some leading cases the position of (a) private vessels, (b) public vessels in the port of other States in peace times.

A. Jurisdiction over private vessels.—(1) The jurisdiction which a State exercises over private vessels sailing under its flag while on the open sea is different in many respects from that which it exercises over the vessels while it is on the foreign territorial waters. The vessels while they are on open sea remain exclusively within the jurisdiction of their flag State. But this exclusive jurisdiction is, however, subject to the following exceptions recognized under the customary international law :

(i) A belligerent has the right of visit and search of all merchant vessels encountered on the high seas in the enforcement of the rules of contraband and blockade.

(ii) Men-of-war of every State in order to maintain safety on the high seas against piracy have the power to stop and visit any suspicious private vessel though ostensibly sailing under a flag.

(iii) Men-of-war of a littoral State has the power to pursue into the open sea, seize and bring back into port for trial any merchant vessel that had violated the law whlist on the territorial waters of the littorial State. This right of pursuit or seizure can be exercised either when the vessel is still within territorial waters or has just escaped thence. No vessel can, however, be pursued when it has entered the territorial waters of another State. This rule is popularly referred as the doctrine of 'Hot Pursuit.'

(iv) Men-of-war of every State have the right to seize and to bring back to the port every vessel sailing under the flag of their State.

(v) Collision cases also make exception to the general rule. A vessel coming into collision with another vessel on the high seas and subsequently putting into a foreign port is liable to be proceeded against, even though

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both ships be foreign and involve only foreigners in the collision. The principle of such assumption of jurisdiction is that, "It is not the locality of the tort but the presence of the parties or the *res* before the tribunal which gives the court jurisdiction," See the case of the S. S. Lotus.

(vi) Salvage case from exception to the exclusive jurisdiction of the flag State—The Johann Friederich ; The Two Friends ; The Leon.

Position in the territorial waters of a foreign State.—The position however, is different in case of vessels while they are in the port or territorial waters of a foreign State. The territorial supremacy of a State over vessel flying its flag comes into conflict with that of the foreign State in the territorial waters of which the vessel happens to be. International Law recognizes that a vessel when it enters the port or territorial waters of a foreign State subjects itself to the jurisdiction of the foreign State and that the flag State is left within a limited jurisdiction over the vessel. The rule of customary International Law, however, limits the jurisdiction of the flag State over vessels in ports or territorial waters of a foreign State to matters of internal discipline of the vessel. According to this rule, the foreign State cannot interfere with the matters of internal discipline of the vessel unless its help is asked for or unless the tranquility of the port is endangered. Subject to these limitations, the vessel while in port or in territorial waters of foreign State is subject to the territorial jurisdictions of the foreign State.

The foreign State subject to the limited jurisdiction of the flag State exercises territorial supremacy over merchant vessel of the flag State, with following consequences ;—

(i) The citizens of the foreign State in the port of which the vessel happens to be for the time-being can file civil action *in rem* against the merchant vessels.

(ii) The officers and the crew of the vessel are subject to the civil jurisdiction of the foreign State in the port or waters of which the vessel happens to be. The effect of this jurisdiction is that civil action in *personam* can be filed against officers and crew of the vessel in the Courts of the foreign State.

(ii) The officers and the crew of the vessel are exempt from criminal jurisdiction of the foreign State in respect of anything done in violence of the Laws of that State.

(iv) The foreign State has no right to interfere with the personal and property rights of individual on board the vessel.

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(b) Public Vessels.—Refer to Q. No. 53, Public ship of foreign States.

Q. 65. (a) Under what circumstances and within what limits a State can exercise jurisdiction on the high seas. (I. A. S. 1968, 1964. 1960 ; P. C. S. 1977, 1975 1973, 1971, 1970).

(b) is it in consonance with international law to reserve a certain area of the high seas for conducting atomic tests ?

Ans (a) Jurisdiction on the High Seas.—We have already discussed that the seas beyond the territorial waters—the high seas as they are called—belong to none in particular and are open for all States for navigation. This refers to as the freedom of high Seas. It is, now, a well settled proposition of International Law that no particular State can claim general jurisdiction over the open sea. But though the principle of freedom of open sea is now established it would be impossible to leave the seas, which are used by the ships of all nations, unregulated by any law, and it is necessary therefore to determine the circumstances in which a State may extend its authority to the seas :—

1. Every State has jurisdiction over ships flying its flag on the high seas. It may apply its law, civil and criminal, to all on board irrespective of their nationality. "The justification of this principle is simply this that some law must prevail on ships, and there is no other law to compete with that of a flag State ; it is needless to explain it by regarding ships as floating portions of a State's territory, a metaphor which, if pressed, would lead to absurd result that the waters surrounding a ship from time to time would be territorial waters"—*Brierley*. Collisions at sea betwehn two ships of different nationality raises a difficulty. These most commonly give rise to proceedings *in rem*, and according to British practice, such proceedings may be brought in the courts of any State in which the ship at fault may be found. Criminal proceedings would be taken in the courts of the State of the defendant, but if the decision of the majority *in the Lotus cases* is correct, the State of the injured ship would have concurrent jurisdiction.

2. It follows from the principle of each State's jurisdiction over its own ships, that no State has a general right to police the high seas. But there are certain special cases in which such a right is admissible. Thus :—

(i) a State may seize and bring into port any ship sailing under its national flag without authority, and such a ship may be confiscated in its courts.

(ii) Again, if a foreign ship has committed an offence in territorial waters and escaped to the high seas, the pursuit may be

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continued there and the ship brought back and dealt with, this is called the right of 'hot pursuit', and the condition of its exercise are that the pursuit must follow immediately on the escape of the vessel and be continuous.

(iii) There are also numerous cases in which by treaty States have accorded to other States certain rights of police or jurisdiction over their ships. The North Sea Fisheries Convention of 1882 gives the signatory States rights of search over one another's fishing vessels, but the adjudication over offences against fishery regulations were reserved for the State of an offending vessel.

(iv) Similar rights have been agreed for the protection of submarine cables, and for the suppression of slave trading The practical difficulty lay always in the extreme reluctance of States to allow their ships to be searched by the ships of other States, but the reduction of slavery itself during the nineteenth century reduced the dimensions of the problem, and these and other treaties eventually gave the armed vessels of one State power to search the suspected ships of another within certain geographical limits. The matter is regulated by a Convention signed at St. German in 1919.

3. A State may seize pirates on the high sea and bring them in for trial by its own courts, on the ground that they are *hostes humani generis*. But this applies only to persons who are pirates at International Law. Such acts may be piratical in the law of a particular State which are not so at International Law ; for example, in English Criminal Law it is piracy to engage in slave trading. There is no authoritative definition of International piracy, but it is of the essence of piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority. Thus an act cannot be piratical if it is done under the authority of a State, or even an insurgent community whose belligerency has been recognized.

Recently U. N. Convention on Law of Sea, 1982 has enumerated some of the freedoms in its Article 87 (1) as follows—

(a) freedom of navigation ;

(b) freedom of overflight ;

(c) freedom to lay sub-marine cables and pipe lines ;

(d) freedom to construct artificial Island and other installations permitted under international law ;

(e) freedom of fishing ; and

(f) freedom of scientific research.

It is also provided that these freedoms shall be exercised by

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all states, with due consideration for the interest of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under the convention with respect to activities under the area. It is further provided that the High Seas shall be reserved for peaceful purposes. Moreover, no state may validly purport to subject any part of the high seas to its sovereignty

4. Self defence, according to the view of some authorities. may justify the exercise of authority by a State on the high seas, For example, in 1873 the Spaniards captured on the high seas an. American vessel, the *Virginius*, which was on its way to assist insurgents in Cuba. Some of those on board were British subjects and they were summarily executed in Cuba. The British Government protested against the executions which could not be justified on the ground of self-defence but they were disposed to accept the capture of the ship and detention of those on board as justified. The view, however, is not universally accepted.

(b) Reservation of portions of high seas for conducting atomic tests.—There is no universally acknowledged law on the point. But on the basis of the doctrine of freedom of open sea, it can well be argued that such reservations are not justified under the principles of International Law. The appropriation or reservation of a portion, howsoever small, of the open sea is against the spirit of International Law as it amounts to exercise of jurisdiction over that portion and to deprivation of other States of their right to freedom of open sea.

CHAPTER XII

PIRACY

Q. 66. Write a short critical note on piracy. What are critical ingredients of an act of piracy ? (I. A. S. 1973, 1961, 1958 ; P. C. S. 1969).

A. Piracy.—Different jurists have given different definition of piracy. But in its ordinary sense the term 'piracy' stands for acts of robbery committed against vessels at sea. It may be noted that, in international Law, the term 'Piracy' has now acquired a definite technical meaning. The legal import of the term changed at every stage of the development of International Law. In *re Piracy Jury Gentium* [(1934) A. C. 586] the Privy Council has noted the various changes in the legal implications of the term which may now be regarded as having more or less definite meaning in law. In 1926. the League of Nations for the purpose of codifying the law relating to Piracy appointed a sub-committee of experts.

According to Oppenheim, ".....piracy must be defined as

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every unauthorised act of violence against persons or goods committed on the open sea whether by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.

In an American case, the federal court expressed the view that the armed ship in the sea should be under the authority of some State and if such a ship is not under the authority of any State, it would be treated in the category of pirate ships, irrespective of the fact whether it has committed piracy or not.

Article 15 of the convention on the High Seas (April 29, 1958) defines piracy as consisting of "any illegal acts of violence, detention, or any act of depredation, committed for private ends by those aboard a private ship or private aircraft, or persons or property thereon, or, in territory or waters of the nature of *terra nullius* (*i. e.*, not under the jurisdiction of any State) against a ship or aircraft of persons or property thereon."

Essential elements of piracy.—It may thus be noted that the essential ingredients of an act of piracy are :

1. There must be an unauthorised act of violence against persons or property.—An actual attack or mere threat of an attack on the vessel or its crew and passengers will amount to an act of violence. The Privy Council in *Piracy jure Gentium* (1934) A. C. 580 : A. I. R. 1934 P. C. 220 held that "actual robbery is not essential element in the crime of *Piracy Jure Gentium* and that a frustrated attempt to commit piratical robbery is equally *Piracy Jure Gentium.*" In the well-known case of *Ambrose Light* of the Ambrose Light 25 Federal 308, it was held that "an armed vessel sailing on the sea in suspicious circumstances without actually committing any act of violence may be a pirate and may be seized."

2. The act of violence must be committed on the open sea.—An act of violence committed in territorial waters of a State cannot amount to piracy under International Law.

3. It must be committed by a private vessel against another vessel.—It is only a private vessel that can commit piracy. A public ship so long as it sails at the direction of its State Government cannot be regarded under International Law to be a pirate and if it commits any act of violence redress may be asked for through diplomatic channels.

But, if a public ship in distinct disregard of the order of its State Government takes up an independent position, its acts of violence would he piratical and its position will be deemed to be that of a private vessel.

An armed private vessel commissioned by a belligerent to seize

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and plunder enemy ship is called a privateer. A privateer commissioning it is not a pirate but if it commits acts of violence against other vessels it becomes a pirate. A neutral vessel operating under the commissions of both the belligerents will assume the character of a pirate and its acts of violence will be piratical under the law. Further, if a neutral vessel without any commission from either of the belligerents commits act of violence on the open sea on the vessels of one of the belligerents or on the vessels of any other State it will so long as it operates against enemy vessels of the State be held to be committing act of piracy. A privateer having knowledge of the fact of the termination of the war is not entitled to commit acts of violence and, if it does, it commits piracy. On the other hand, if it has no information of the conclusion of war and commits acts of violence it cannot be regarded as a pirate as held in the case of *Shenandoh*, where the British Government refused to hold a vessel which had committed acts of violence after the termination of the American Civil War in ignorance of the fact of termination, a pirate.

The act of violence must be directed against a vessel which may either be private or public. The object of the act may be to plunder goods or to seize or kill persons on board the vessel.

4. The act may be committed by a mutinous crew or passengers against their own vessel.—Members of the crew and passengers who revolt against the authorities of their own vessel and plunder goods and seize or kill people on board the vessel are pirates under the law. It is necessary that the object of the mutinous crew or passengers should be to appropriate to their own use the vessel or the goods thereon.

5. Violence, detention or any act of depredation may constitue piracy provided that the above elements are satisfied.

6. Illegal acts of violence, detention or any act of depredation may be either on the high sea or in a place outside the jurisdiction of any State.

Piracy under Municipal Law.—There is difference in the concept of piracy under International law and Municipal law. Some States may declare crimes those acts of violence, detention or depredations which are not crimes under International law. On the other hand, States may also declare crimes lesser acts of violence than those declared by International law.

CHAPTER XIII

ACQUISITION AND LOSS OF TERRITORY

Q. 67. Explain briefly the principal modes of acquiring and losing territory. Refer to relevant cases and events.

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[I A. S. 1954, 1959, 1964, 1971, P. C. S. 1965, 1971, 1972, 1973, 1976.]

Ans. Modes of acquisition of State territory.—The modes recognized by International Law by which an existing State can acquire territory are as follows :—

Occupation.—*Oppenheim* defines occupation as an "act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State." The territory to be occupied must be *res nullius* in the sense that it is either uninhabited or occupied by an uncivilized people or by a tribal organisation which cannot be called a State.

The title of a State to a territory not belonging to any other State is valid only when its occupation of that territory is effective and not merely fictitious. In order that an occupation may be effective, it is necessary that a State must take possession of a territory and establish its administration over it.

The next step towards effective occupation is to establish administration over the territory. The territory sought to be appropriated must be governed by the State occupying it. The Government must be established over the territory.

Occupation differs from subjugation. In subjugation the State subjugated had been under the sovereignty of another State while in occupation, previously no State exercised sovereignty over it.

Illustration —Indonesia claimed a fishing Island in Indian Ocean as a part of its territory because it is close to Indian, Indonesian shore. The Island has been in Indian occupation for over a century though there is no permanent population of the Island. There is no jurisdiction in Indonesian claim as this Island has been in Indian occupation (P. C. S. 1973).

In this case, the Court laid down two elements of effective occupation.—(a) an Intention or will to act as sovereign, and (b) the adequate exercise or display of sovereignty.

1. Island of Palmas Arbitration —(American Journal of International Law (1928) Vol. 22 at pp 875-6)—It now follows from the Island of Palmas case decided by *M Huber* as Arbitrator, that mere act of discovery by one State without more is not sufficient to confer a title by occupation and that such incomplete appropriation must give way to a continuous and peaceful display of authority by another State. In this arbitration, the contest of title lay between the United States, claiming as successor to Spain which had originally discovered the island disputed, and the Netherlands which accor-

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ding to the historical evidence submitted to the Arbitrator, had for a very long period purported to act as sovereign over the Island. The Arbitrator adjudged the island to the Netherlands, and in giving the reasons for his award laid supreme emphasis on the fact that long continuous exercise of effective authority can confer title at International Law.

2. **Accretion**—*Oppenheim* defines accretion as 'increase of land through new formations'. An island coming out of a river is an accretion to the territory of a State which owns the river. Accretion may be either natural or artificial. Embankment, dykes and breakwaters which require human efforts for their formation are artificial accretions while newborn Islands are natural accretions. New Islands are formed on rivers and maritime belts by natural processes and add to the territory of a State. The question of accretion by the birth of a new island arose in the case of the *Anna* [5 C. Rob. (372)] relating to the capture of a Spanish vessel by a British privateer. The United States claimed that the vessel was captured within the American maritime belt. Lord *Stowell* upheld this claim on the ground that the vessel was captured beyond three miles of the Continental coast but within three miles of some mud islands which were formed within the American maritime belt. The mud islands were held to be accretions extending the territory of the United States. This case also shows that the maritime belt was measured from the mud Islands and not from the coast.

3. **Subjugation.**—Subjugation as a mode of acquisition of a territory is the result of a war Some writers call conquest as the mode of acquisition of a territory. *Oppenheim* is of the opinion that conquest alone is not enough to validate the title to sovereignty over enemy territory. According to him, conquest of enemy territory coupled with formal annexation, gives a valid title to the conqueror. Mere possession by the conqueror of the enemy territory is nothing because it is not until annexation takes place, the rights of the vanquished State over that territory cease to exist. "Annexation turns conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist, and brings the territory under the conqueror's sovereignty."

4. **Prescription**—*Oppenheim* describes prescription "as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with International order." Acquisition of title by prescription is based on long possession and user. As to what length of time is necessary for acquisition of title by prescription depends on the circumstances of each case. Long possession and user over

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a territory acquiesced in by other States is enough to complete title by prescription.

Thus a State may acquire some territory of other State by prescription. In this connection following points are to be noted :—

(a) A State may acquire some territory by prescription, only when it has not accepted the sovereignty of any other State over the said territory.

(b) Possession should be peaceful and uninterrupted.

(c) Possession should be in public ; and

(d) Possession should be for definite period.

It may also be noted that in the presence of some treaty or convention, territory cannot be acquired by prescription through administrative acts only.

5 Cession —The concept of transfer of property as embodied in private law is also present in international Law in the form of cession which is recognized as mode of acquisition of property. When a State which is the owner of a territory transfers it to another State it cedes the territory and the State to which it is ceded gets title by cession. *Oppenheim* defines cession as 'the transfer of sovereignty over State's territory by the owner State to another State'.

Cession takes place by agreement and ordinarily the territory is ceded under the terms of a treaty. Cession may be necessitated by the terms of a treaty of peace on the conclusion of a war. The territory may be ceded on recovery of compensation. The owner State can cede the territory without compensation or by way of gift.

In *re Berubari* case (1960), the question arose whether the Government of India can transfer territory of Berubari to Pakistan. The Supreme Court in its advisory opinion held that the Government can transfer the territory only after passing the law by Parliament to this effect.

As regards the effect of cession on property of the inhabitants, the Supreme Court of India in *Union of India* v. *Sudhanshu Mukerjee*, A. I. R. 1971 held that a cession does not amount to a transfer of the property belonging to the inhabitants unless there is anything contrary in the treaty.

In a recent case, *Sudhendu Roy* v *Union of India & others* (AIR 1983, Cal. 468) The question arose whether giving of "TIN BIGHA" area to Bangladesh on lease in perpetuity under the agreement of 1974 and 1982 between Bangladesh and India amounted to cession or not ?

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The Calcutta High Court, held, ..." The implementation of these two agreements would not involve Cession of any territory to Bangladesh in respect of Teen Bigha.....not merely that no exclusive possession of this area is sought to be transferred to Bangladesh but no legal possession at all is being transferred. There is no question of transfer of sovereignty, wholly or partially, in respect of the said area. What has merely been done is to enable the Government of Bangladesh to exercise certain rights in respect of the said area.

Cession and occupation distinguished —Cession is a derivative mode of acquiring territory while occuption is an original mode. The difference between cession and occupation lies in the fact that sovereignty is derived from the owner State in the case of cession while it is intentionally acquired by the occupying State itself in occupation.

Plebiscite.—There is no rule of International Law which requires plebiscite to validate a cession of territory. But it is claimed by some writers that, inasmuch as the sovereignty of the new owner is forced upon, the inhabitants of the ceded territory it is proper that a plebiscite be held for the purpose of taking the consent of the inhabitants in favour of the cession of the territory where they live. This claim cannot, however,be supported except on the grounds of necessities of international policy. The Treaties of peace concluded after the First World War adopted the method of plebiscite in a number of cases. The French Constitution of 1946 provided for plebiscite in case any new territory was added to France.

6. **Lease of State Territory.**—A State is entitled to lease its territory to another State for a term of years. Lease of State territory are of a recent origin and materially differ from leases of the private law. Apart from the element of coercion in their negotiation it would seem that the sovereignty of the lessor State over the territory was more nominal than real. [*Fenwick* i International Law (3rd Ed.) p. 368]. A recent example of transfer of territory by lease is that of lease in perpetuity of "TEEN BIGHA" by India. (See *Union of India* v. *Sukumar Sen Gupta*, AIR 1990 SC 1962) Though the agreement transferring 'Teen Bigha' to Bangladesh used the term 'lease' the Supreme Court of India held that the concessions granted to Bangladesh over the said portion of land amounted to 'servitude'.

7. **Pledge of State Territory.**—A State is also entitled to take a loan on the security of its territory or part of it. History evidences numerous cases of pledges of state territories. In 1768 the then Republic of Geneva pledged Corsica to France.

8. **Annexation.**—If the State conquers another State and

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establishes effective control of the conquered State acquires the territory.

9. Acquisition of territorial sovereignty by newly emerged State.—A newly emerged State can acquire territorial sovereignty only when it becomes independent.

Loss of State territory —According to *Oppenhiem* loss of State territory occurs, in six ways *viz.*, cession, operation of nature, subjugation, prescription, revolt and dereliction.

1. Cession.—The acquisition of property by one State is the loss to the other. The acquiring State gains the territory which the ceding State loses.

2. Operation of nature.—Accretion is a mode of acquiring property and corresponding to the mode is the mode of losing territory by operation of nature. Disappearance of land by natural actions results in loss of territory to a State. Volcanic action may cause an island to disappear and thus lead to loss of territory to a State.

3. Subjugation and prescription.— It is obvious that in these ways one State gains what the other State loses.

4. Revolt.—History records innumerable cases in which revolt caused the loss of territory to States. As a result of a revolt, Netherlands broke off from Spain in 1579, Belgium from Netherlands in 1830, United States of America from Great Britain in 1776 and Brazil from Portugal in 1882.

5. Dereliction —This mode corresponds to occupation. Dereliction consists in the complete abandonment of the territory by a State owning it When a State abandons a territory it ceases to exercise sovereignty over it with the intention of having nothing to do with it in future, it loses the territory. Dereliction is complete, when a territory is actually abandoned with the intention of altogether withdrawing sovereignty from it.

Q. 68. Can sovereignty be acquired over the planets other than the earth ? What problems will arise if man's attempt to conquer moon and mars succeed ? Discuss with cognate reasons referring to latest events in this direction.

Ans. Acquisition of Sovereignty over other Planets.

To acquire territory by occupation there must be two elements, i.e.,

(i) elements of possession ; and

(ii) will, to keep the possession. In other words, the occupa-

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tion must be effective. Mere discovery alone cannot give title. The Permanent Court of Arbitration in the *Island of Palmas* Case (1928) observed. "However according to the view that has prevailed at any rate since the nineteenth century an inchoate title of discovery must be completed within a reasonable period by effective occupation of the region claimed to be discovered." Thus, it is quite essential that after discovery control should be taken of the territory discovered. The adjudication in the Clipperton Island Arbitration between France and Mexico (1931), it was observed that, "It is beyond doubt that by immemorial usage, having the force of law besides the *animus Occupandi*, the actual and not the nominal taking of possession consists in the act or series of acts, by which the occupying State reduces to its possession of the territory in question and takes steps to exercise exclusive authority there."

However, one should not forget the typical character of the problem of acquiring sovereignty over the moon, the mars and the other planets. It may be argued that by the nature of the territory it is not possible to establish administration over it. But, such an argument is not tenable. It will be conceded by all that the sovereign State must exercise some sort of practical influence over its territory otherwise there is no sense in having such a territory. The assertion of sovereignty should be displayed. The discovery gives mere inchoate title which is eventually perfected by effective control and administration of the territory.

Thus we see that the sovereignty over Moon, the Mars and the other planets cannot be acquired by occupation at least and hence no problem of International Law will arise in this respect. It is interesting to note that no State has so far claimed sovereignty over the planets other than the earth.

CHAPTER XIV

STATE SUCCESSION

Q 69. Define State succession and explain its meaning "With the extinction of an International person, disappear its rights and duties as a person' (Oppenheim)" Elucidate the statement. What do you understand by Universal Succession and Partial Succession? Explain, [I.A.S. 1963, 1966, P.C.S. 1973].

Ans. A succession of Government occurs when the Government of a State is replaced with a new one. State succession occurs into existence when a State ceases to exist or a new State is formed within the territory of an existing State, or territory is transferred from one State to another State. [Edward Collins-International Law in a Changing World 1969 page 105].

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The rule of State succession was incorporated from the Roman law by Grotius. In Roman law same principle applies when a person dies, his rights and duties are succeeded by his successors The U N. Conference on succession of States in respect of treaties, convened in accordance with General Assembly resolution 31/18 met from 4th April to 6th May, 1977 in Vienna and adopted 25 out of 39 articles on the succession of States prepared in 1974 by the International Law Commission.

Loss of International personality.—A State ceases to be an International person when it becomes extinct. The extinction of a State may be voluntary or forcible. It is voluntary when a State by its own act ceases to be a State in the sense of International Law. A State joining a federation becomes extinct by a voluntary act and loses its international personality willingly. The extinction is forcible when it ceases to be a State not by its own act but against its will by conquest or annexation. The international personality may be lost in part only. When the extinction of a State is not complete so that the State retains some of its personality, the extinction of a State is only partial An independent State becoming a protectorate does not completely lose its personality.

Important consequences which flow from complete extinction of a State are :

(1) All rights and obligations associated with the personality of the extinct State cease to exist.

(2) All political treaties concluded by the extinct State become null and void.

(3) The rights of the extinct State at International Law can not be enforced in its name. similarly, no international obligation can be enforced against the extinct State.

Succession of States.—The problems relating to State succession arise when the territory of one State becomes totally or partially part of the territory of another State or when the territory of one State becomes by dismemberment the territories of several new States or when the part of the territory of a State becomes the territory of a new State as a result of a civil war. *Oppenheim* sums up the position thus :—

"The practice of States showed that no general succession takes place according to the Law. of Nations. With the extinction of an International Person disappear its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an international person from its predecessor. And since his devolution takes place through the very act of

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one international person following another in the possession of State territory, there is no doubt that as far as these devolving rights and duties are concerned, the succession of one international person to the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place."

Ordinarily, the practice of States shows that no general succession taken 'with the extinction of international person disappear its rights and duties as a person.' This seems to be correct to a great extent. But to say that no succession takes place among the States would not be correct.

When the international person is substituted partially or wholly for another international person, a succession of international person takes place Succession is either universal or partial.

Universal Succession.—When either through subjugation or voluntary merger one State is completely absorbed by another State, the succession is universal. Universal succession involves complete absorption of one international personality into another. The complete absorption of State may take place :

(a) When a State voluntarily merges into one or several States. When a State joins a federation, it loses its identity as occurred in 1845 when Republic of Texas was admitted as member of the American Union, or

(b) When one State is split up into several States with the result that there are as many successors at law as there are separate States.

In the case of universal succession the State which is absorbed becomes totally extinct and the State which has absorbed it remains the same international person as before.

Partial Succession.—Partial succession takes place.

(i) when as a result of civil war a part of the territory of a State breaks off and takes up an independent position as a State. Such was the case of the United States of America which separated from Great Britain.

Such is also the case of Bangla Desh which separated from Pakistan and became an international person.

(ii) when an existing State acquires a part of territory of another State by cession, or

(iii) when a full sovereign State loses part of its independence by joining a federation and coming under suzerainty or under a

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protectorate or when a not full-sovereign State becomes a full sovereign power.

Q. 70. Discuss briefly the rights and liabilities arising out of succession. Give examples and cite case. (I A.S. 1966).

A. On succession taking place, the rights and obligations of the succeeding or absorbing State are regulated by the terms of the pact of union or by the treaty of cession or by the treaty of peace. In the absence of any such agreement, the position of the absorbing State with regard to the rights and obligations of the extinct State is as follows :—

(a) Treaty Rights and obligations.—(1) The rights and duties associated purely with the international personality of the extinct State or arising from its purely political treaties disappear with the extinction and no succession in respect thereof takes place. In the case of annexation of Madgascar by France in 1896, the commercial treaties become extinguished. But those personal treaties which are recognised by the absorbing Government continue to be operative. In the case of *Terlindon* v. *Ames*, (184 U.S. 270), it was held by the United States Supreme Court that the extradition treaty made between the United States and Prussia prior to the formation of German Empire continued to be operative after the union on the ground that the treaty had been officially recognized by Germany.

Article 1 of Vienna convention on succession of states in respect of Treaties, provides that the convention applies to the effects of a succession of states in respect of treaties between states. As regards agreement for the devolution of treaty obligations or rights from a predecessor state to a successor state. Article provides that the obligations or rights of a predecessor state under treaties in force in respect of territory at the date of succession of states do not become the obligations or rights of the successor state towards other state parties to these treaties by reason only of the fact that predecessor state and the successor state have concluded an agreement providing that such obligations or rights shall devolve upon the successor state.

(2) Succession takes place with regard to those rights which have become vested in the extinct State. Such international rights and duties of the States as are locally connected with its land, rivers, roads, railways and the like devolve on the absorbing State. Similarly, treaties concerning boundary lines, rivers, railways and the like remain valid and the absorbing State is bound by them.

(b) Properties.—Public properties and funds of the extinct State devolve on the absorbing State. The title properties of the

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extinct State in third States, credits owing by the third States of their citizens to the extinct State, easements possessed by the extinct State in respect to the public or private property of the third State pass on to the absorbing State by succession. When a State is split, up in the several States the fiscal properties and funds of the extinct State are to be divided proportionally among the several new States. Succession of States in respect of properties, have also been taken into consideration by the recent Vienna Convention on State property, Archives and Debts 1983. Article 12 of this convention provides that property, rights and interests owned by a third State should not be affected by a succession of States.

(c) **Contractual rights and obligations** —The absorbing State is bound by contract entered into by the extinct State with third States or their citizens. Such contracts may either be with regard to public works or may be concessionary, i.e., contracts granting concessions to work up mines, running of a railwary or the like. But it is not clear that the absorbing State is bound by contracts giving rise to pecuniary liability of the extinct State.

(c) **Torts.**—Accoring to the principle enunciated in two well-known cases the *Robert E. Brown Claim* [American Journal of International Law (1925) Vol. 19, p. 193] and the *Hawaian Claims* [American Journal of International Law (1936) Vol. 20, p. 381] the successor State is not bound to respect an unliquidated claim for damages in tort. But, it is liable for damages for tort which had been acknowledged by the extinct State and in respect of which extinct State had agreed to pay compensation.

(e) **Debts.**—There is no settled rule about the debts of the extinct State. Generally the debts of the extinct State are taken over by the new State or States. In the case of a State splitting up into several new States, the debts are proportionately taken over by the new States. But there are cases where the debts have not been taken over. In the case of *West Rand Central Gold Mining Co.* v. *Rex*, (1905) 2 K. B. 391, the British Court held that a creditor of the extinct State cannot claim to recover a private debt from the new State.

The recent practice of States, after the conclusion of Peace Treaties at the end of the First World War, is to respect the acquired rights of private persons, whetherproprietary, contractual or concessionary.

Example of Bangladesh and Pakistan.—After becoming of independent State of Bangladesh, it was a burning question of international law as to whether Bangladesh should be bound by the

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public debts taken by Pakistan. Bangladesh declared that it was not bound by public debts taken by Pakistan. On the other hand Pakistan was of this view that the public debt was taken for the development of Bangladesh, therefore, Bangladesh would be liable for public debts. Countries, aiding Pakistan consortium were very anxious for the recovery of public debts. According to these countries, Pakistan was bound to pay public debt taken by it and no matter they were spent in Bangladesh or Pakistan. A meeting was held on March 21, 1973 by these States but no solution of the problem could be found. In this connection it may be noted that Russia relieved Pakistan from the recovery of that part of public debts which were spent in Bangladesh. Thus the better view is that Bangladesh should pay that part of public debt spent on in the development works in Bangladesh.

(f) Succession and Private or Municipal Law Rights.—Such of these rights as have crystallised into vested or acquired rights must be respected by the successor State ; more especially where the former Municipal Law of the predecessor State has continued to operate, although to guarantee the sanctity of the rights. The successor State, however, can always displace existing rights and titles by altering the former Municipal Law, unless in doing so, it breaks some other independent duty under International Law, for example, by confiscating the property of aliens without due compensation.

(g) Succession and Nationality.—Persons living or domiciled in the ceded or vanquished territory *prima facie* acquire the nationality of the successor. Concerning the position of those citizens of the predecessor, normally living or domiciled in such territory but outside it at the time of change, it may be noted that there is no duty at International Law upon the successor State to grant any right of option as to citizenship, nor correspondingly is there any duty upon the predecessor State to withdraw its nationality from persons normally living or domiciled in the transferred territory.'

Q. 71. Discuss the following proposition—"A State which has annexed to another is not legally bound by any contracts made by the State which has ceased to exist."

A. A great controversy revolves round the question as to how far an annexing State takes over the contractual liabilities of State whose territory it annexes. Oppenheim is of opinion that the recent practices of States.....tends to establish as a rule of International Law, the duty of a successor State, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons whether proprietary, contractual or concessionary. A contrary view, however was taken by the English Court in *West Rand Central Gold Mining Co.* v. *The King* [(1905) 2

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K. B. 391], which declared that the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country and it is entirely at his opinion to what extent he will adopt them. While the former view is somewhat in advance of the actual state of international Law on this matter the latter is certainly behind it.

In the case of *The Mavrommaties Palestine Concessions* [(1924) P. C. I. J., Series A. No. 2, 3, at page 28], the Court held that the administration of Palestine was bound to respect certain concessions granted by Turkey to a Greek subject for works to be carried out at Jerusalem.

The solution of the matter is to be found by considering the nature of the contract and particularly whether the identity of the original contracting State is or is not a material element in it. Thus, it is generally assumed that an annexing State is not bound to take over a public debt incurred for the purpose of financing a war against itself."—*Brierly*—The Law of Nations (5th Ed). p. 148.

Starke.—An Introduction to International Law (4th Ed.) p. 242, formulates the following principles :—

(a) A contractual right which is solely of the nature of a claim to unliquidate damages and which cannot be alternatively enforced as a quasi–contractual right against the predecessor or successor does not survive the change of Sovereignty. But, if some element of quasi–contract is involved, for example, unjustified enrichment to the predecessor or successor State, the right and corresponding obligation will survive.

(b) A contractual right which is of the nature of a vested acquired right must be respected by the successor State. To be such a vested or acquired right, it must be liquidated in nature, and correspond to some undertaking or enterprise, or in more general terms the right must be such that it would be unjust for the successor State not to give effect to it. Hence a merely executory contractual right, without more is not a vested or acquired right.

In India, in *Prem Chibar* v. *Unian of Indta*, AIR (1966) S. C. 442, the court held that whether new sovereign has recognised the rights of the new subjects as against himself and has undertaken the liabilities arising thereunder is a question of fact depending upon the new sovereign after the requisition of territory concerned.

CHAPTER XV

INTERVENTION

Q. 72. What do you understand by intervention ? State breifly

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by reference to historical precedents the just grounds for intervention. I. A. S. 1957, P. C. S. 1972, 1974, 1978, 1990.

A. Meaning of Intervention.—The word intervention is often used quite generally to denote almost any act of interference by one State in the affairs of another ; but in a more special sense it is confined to act of interference either in the domestic or the foreign affairs of another State which violate State's independence. A mere tender of advice by one. State to another about some matter within the competence of the latter to decide for itself would not be an intervention in this sense, though it might be popularly so described, the interference may take an imperative form ; it must either be forcible or backed by the threat of force.

"*Prima facie*, intervention, a hostile act, because it constitutes an attack upon the independence of the State subjected to it... ....Regarded from the point of view of the State intended upon it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power—a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding." (Hall, International Law (5th Ed. p. 248).

In 1970, the General Assembly of U. N. adopted unanimously a resolution that every State has the duty to refrain from organising another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. Resolution further added, no State or group of States has right to intervene directly or indirectly for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference of attempted threats against the personality of the State or against its political, economical and cultural elements, is violation of international Law.

Kinds of intervention.—Prof. *Winfield* refers to three kinds of interventions :—

(1) Internal Intervention.—This is intervention by a State in a civil war going on with the territory of another State. The intervening State in such a case may side with insurgents or the legitimate Government. The intervention of a number of States in the civil war in Spain in 1936 was typical of internal intervention.

(2) External Intervention.—It is an intervention by a State in the foreign affairs of other States. As a general rule, an external intervention is directed against hostile relations of other States.

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While there is a war going on between two States, a third State can make an external intervention by entering the war on behalf. of either of the two States.

(3) **Punitive Intervention.**—It is resorted to by a State when it has suffered an injury by some action of another State and may be stated as an act of retaliation against the State. The punitive intervention may take the form of a Pacific blockade.

Legitimate grounds for intervention.—U. N Charter has brought about revolutionary changes regarding the valid grounds of Intervention. Most of the traditional grounds have ceased to be valid. A critical discussion of the following grounds is being undertaken with a view to see which of these grounds are still valid.

1. Intervention for self preservation and self defence.—Interventions for self-preservation or self-defence are excused by International Law only when they are absolutely necessary for averting the danger. In order that a State may justify its intervention on grounds of self-preservation or self-defence, it must be shown that any injury of the gravest character was threatened, that the State intervened was not itself able to avert the danger and that nothing was done in excess of the requirements of self preservation. Webster's statement in the case of the *Caroline* that the necessity to justify action in self-defence should be "instant, overwhelming and leaving no choice of means, and no moment for deliberation". This principle was affirmed by Nuremberg Tribunal in 1946. The test laid down in the *Caroline* was finally settled by International Court of Justice in Corfu Channel case.

Right of self defence under Article 51 is subject to following conditions :—

(1) There should be an armed attack.

(2) The right exists until Security Council has taken any action.

(3) It should be reported to the Security Council.

(4) This right shall not affect the responsibility of the Security Council for the maintenance of peace and security.

(5) The right is not available against a non-member of the U. N.

2. Intervention on Grounds of Humanity.—Intervention is also justified by International Law on grounds of humanity. When the Civil War ensued between the Pakistani Government and insurgents of Bangla Desh, India intervened on humanitarian grounds, because

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Pakistan left no stone unturned to suppress the human rights and fundamental freedoms of the people. The question may sometime arise as to how far intervention on the grounds of humanity is permitted by International Law at the present time. The Charter of the United Nations also recognises intervention for the protection and promotion of human rights and fundamental freedoms. It would thus appear that in accordance with the provisions of the Charter collective intervention on the grounds of humanity is permitted. Intervention by United Nations in Iraq on behalf of the Kurdish people is a glaring example on the point.

3. **Enforcement of Treaty Rights.**—Intervention may be justified in case it is resorted to for the enforcement of treaty rights. Great Britain while declaring war on Germany invoked for its justification the treaties of London of 1831 and 1839 guaranteeing the integrity and neutrality of Belgium. Similarly, America invoked Article 3 of the Treaty of Havana 1962 for the intervention in Cuba. But it may be noted that U. N. Charter has propounded the principle of non intervention and States have undertaken not to intervene in the external or internal affairs of the State. Jurists are of the view that American intervention in the affairs of Cuba cannot be justified.

4. **To check illegal intervention.**—Intervention, which is resorted to check or put an end to illegal intervention is permitted by International Law. The help given by Great Britain to Portugal in 1886 furnishes an example of such intervention. But after coming into force of U. N. Charter it has greatly affected the right of intervention on this ground. Intervention by one State in the affairs of another State is no more permissible.

5. **Balance of power.**—Intervention for balance of power has no meaning at the present time because of the establishment of the United Nations with the maintenance of international peace and security as its main objective. The principle of balance of power lost its significance on the establishment of the League of Nations. The application of the principle of balance of power was regarded by *Vattel* as essentially necessary for the preservation of peace and order in Europe. The Congress of Vienna in 1815 was guided by the principle of the balance of power in its deliberations. The Crimean War of 1854 was waged to maintain the balance of power.

6. **Protection of persons and Property.**—Intervention may also be justified when it is undertaken for the protection of the persons. property and interest of the Nationals abroad. Now this ground has been ceased to be a valid ground, because it is now within the authority of the United States.

7. **Collective intervention.**—This has already been dealt within

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"grounds of humanity. The provision of collective intervention of powers, in the League Covenant and the United Nations Charter, in the event of any State disturbing the peace or threatening the security of the world, gives a fresh ground of justification of intervention by States. The United Nations took such action in Korea (1950) and in Congo (1964).

In 1991 such action was taken in Gulf War for the vacation of Iraqi aggression and occupation of Kuwait.

8. Defence of International Law.—In case a delinquent State commits a breach of the fundamentally accepted principles of International Law all other States are entitled to a right to intervene in defence of International Law.

To cite an example, in 1900 the powers united against China as a result of the assassination of the German-Minister at Peking and other attacks on diplomatic representatives.

9. Intervention in Civil Wars.—In view of the continuous growth of International community, nations of the world have established close relations with each other. If anything happens in a state, it is quite natural that it makes its effect on other state as well. If there is a Civil War in a state, it is likely to affect directly or indirectly other states. Intervention on this ground were held in past and their justiciability were questioned on the U. N. Charter's principle of non-intervention by states in affairs of other states. Thus it has been suggested by some countries that the U. N. should have the right to intervene to check such type of war. Prof. R. P. Dhakolia has pointed out that a successful example of intervention by United Nations is the case of Congo in 1961. It may be noted here that the U. N. can intervene in Civil War only if the Security Council first determines under Article 39 of the Charter that it poses a threat to the peace, breach of the peace or amounts to an act of aggression. If the Security Council makes this determination, provisions of Chapter VII of the U. N's Charter become applicable.

Intervention in Civil War of 'Yugoslavia' and intervention In Iraq on behalf of Kurdish people are other examples.

Q. 73. "That intervention is, as a rule, forbidden by the law of Nations which protects the International personality of the States, there is no doubt. On the other hand, there is just as little doubt that this rule has exception——"(Oppenheim).

Discuss and substantiate the above statement.

A. Intervention by Right.—While generally forbidding intervention, International Law recognises certain circumstances giving a

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right of Intervention of States. It also recognises certain other circumstances which do not give rise to any right of intervention but which are regarded as affording a justification for dictatorial interference. An intervention taking place by right is not regarded by law as any violation of the independence of the State subjected to intervention. In the case of intervention by right the State interfered with has no right to complain because by the rules of International Law its independence is subject to the right of intervention of foreign States. According to *Oppenheim* intervention by right is present in the following cases :—

(1) A State which holds a protectorate has a right to intervene in all external affairs of the protected State. The recent example of this is the sending of force by India to assist Government of Sikkim to maintain law and order. India's action was justified because Sikkim was protectorate State of India and secondly India sent its forces at the request of the King of Sikkim.

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with it unilaterally.

(3) If a State which is restricted by an International treaty in its external independence or its territorial or its personal supremacy does not comply with the restrictions imposed by the treaty, the other party or parties to the treaty have a right to intervene.

(4) If a State in time of peace or war violates such rule of the law of nations as are universally recognised by custom or are laid down in law making treaties, other States have a right to intervene and make the delinquent obey the rules concerned.

(5) When a State has by a treaty, guaranteed a certain form of Government or the reign of a certain dynasty for another State, it has a right to intervene in case there occurs a change in the form of the Government or in the dynasty of another State.

(6) A State may also intervene in the affairs of another State for the protection of its citizens and property in that suit. Thus, a State in the exercise of its personal supermacy can intervene in the affairs of another State for the purpose of protecting the rights and interests and the personal safety of its citizens present or resident within the territory of the another State.

(7) Collective intervention under the provisions of the Charter of the United Nations for the purpose of restraining States from disturbing the peace of the world.

Prof. Brierly states the law thus ;—

"The strictly legal occasions of an intervention may con-

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veniently be brought under three heads—self defence, reprisals and the exercise of a treaty right."

Q. 74. Explain briefly the (a) Monroe Doctrine and (b) the Dargo Doctrine.

A. Monroe Doctrine—The Monroe doctrine may be regarded as American reaction of the Holy Alliance of Europe after the Napoleon's war. American States which hitherto belonged to Spain had declared their independence which had been recognised by the United States. The powers of the Holy Alliance wanted to assist Spain in regaining her possessions and to intervene in the American affairs President Monroe of the United States regarded this Alliance dangerous to American peace and security and considered it of imperative necessity to forestall and European intervention in the affairs of America. To avert this imminent danger President Monroe delivered to Congress on December 2, 1823, his famous message which has gone down in history as the Monroe Doctrine. The portions of this message which constitute the main theme of the doctrine are :—

(1) "That the American continents by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subject for future colonisation by any European power.'

(2) "In the wars of the European powers in matters relating to themselves we have never taken any part nor does it comport with our policy to do so....."

(3) "With the Governments who have declared independence and maintained it and whose independence we have on great consideration and just principles acknowledged we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States."

This declaration of President Monroe provided a weapon of self defence to the American continents throughout the troublous period of the last century. The Monroe Doctrine is not a rule of International Law but expresses the political policy of the Americans.

Brierly describes the significance of the doctrine thus :—

"The Monroe doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in itself is not contrary to International Law, though possible applications of it might easily be so. But it certainly

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is not a rule of International Law. It is comparable to policies such as the "balance of power" in Europe, or the British policies of maintaining the independence of Belgium or the security of our sea-routes to the east or the former Japanese claim to something like a paramount influence over developments in the Far East."

In the presence of U. N. Charter it has lost its all significance.

(b) The Drago Doctrine.—This doctrine named after Dr. Drago the Foreign Minister of Argentine Republic, is a supplementary to Monroe Doctrine. The Drago Doctrine lays down that "a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by European power. It may be noted that the Drago Doctrine did not meet with great success in its particular sphere although in its larger implications it went with the Monroe Doctrine. The necessity for the use of the Drago Doctrine is not likely to occur in view of the provisions of the Charter of United Nations. It may be noted here that United Nation's Charter has propounded the principle of non-intervention and in this context both Monroe doctrine and Drago Doctrine have lost their importance and utility.

Q. 75. (a) Discuss with reference to historical precedents the doctrine of self preservation as an excuse' for violation of independence of another State. In this connection refer also to the relevant provisions in the Charter.

Or

Discuss with historical precedents the doctrine of self-preservation as an excuse for violation of the independence of another State. (C. S. E 1983, 1986).

A. (a) Scope of the right of self preservation.—Every State possesses a right of self-preservation. Inasmuch as a State has a right of self-preservation. It has a right to defend itself against actions which are likely to threaten its existence in any manner or are likely to impair its sovereignty. *Wheaton* observes :—

"Of the absolute international right of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation It is only a right with respect to other States but a duty with respect to its own members, and the most solemn and important which the State owes to them The right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end. Among these are the right of self-defence." *Wheaton*—Elements of International Law, pp. 115-116—It is by the exercise of the right of self-defence that a Sovereign State can maintain its existence. *Hall* describes this right thus : Even with individual living

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in well-ordered communities the right of-preservation is absolute in the last resort."

The right of self-protection or self-defence in International Law affords a justification for certain violations committed by a State. The exercise of this right is not limited to cases in which the existence of State is endangered by some action of nature.

The Caroline (1837).—The case of *Caroline* enunciates the principle of necessity applicable to case of the exercise of the right of self-defence. During a rebellion in Canada in 1837. a body of insurgents armed and organised in American territory having occupied an island on the American side of the Niagara river, wanted to land in Canada by a steamer called the "*Caroline*". The British Government in Canada anticipating this attack sent across the river to a point on the American side, a force which captured and destroyed the *Caroline* killing also two of the crews. In answer to the protest by the American Government, it was stated on behalf of the British Government, that the act was committed in exercise of the right of self-defence. *Mr Webster*, the American Secretary of State, asserted that the necessity required to support the case of self-defence must be "instant, overwhelming, and leaving no choice of means and no moment for delliberation", and that the act committed in self defence must not be unreasonable or excessive. England failed to justify its action on the basis of this test and had to express regrets.

First World War.—Germany claimed justification for the attack on the neutralized Luxemberg on the ground of the right of self-preservation. The *Chencellor Von Bethman Hallweg* speaking before the Reichetag observed that the necessity of the situation compelled Germany to invade and occupy Luxemberg. He said : "A French movement upon our flank upon the lower Rhine might have been disastrous, so we were compelled to override the just protest of the Luxemberg and Belgium Governments." Germany sought to justify its action on the ground of self-defence, although as a matter of fact it had no right to commit act in violation of the neutrality.

Russian invasion of Finland.—Russia invaded Finland in 1939. Her action was not justified as a measure of self-defence and in anticipation of an attack by Germany in spite of the fact that a non-aggression pact was signed between the two countries.

Affair of Korea.—In 1950 North Korea declared war on South Korea. The Security Council of the United Nations adopted a resolution for the purpose of taking punitive action against North Korea. In pursuance of resolution the United Nations army contributed by the members landed in South Korea and drove the North Korean

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army beyond the 38th parallel on to the border of Manchuria. Thereupon, China intervened on the ground that the presence of the United Nations' army near its borders was detrimental to its interest. But, the United Nations declared the intervention of China as illegal intervention.

Distinction between self defence and self preservation.—Under the traditional international law, there was no distinction between the two. Under the traditional international law, the intervention on the ground of self-preservation was permitted. Even military preparations in the neighbouring State could justify intervention. The U. N. Charter uses the term 'self-defence' and not 'self-preservation'. The term self defence is much restricted and allows the intervention only when an armed attack occurs.

Distinction between self defence and self-help.—Self-help is a right which existed in the primitive legal order. The Charter, however, recognises the right of individual and collective self-defence if an armed attack occurred. But even this right, which may be to some extent be called the recognition of the right of self-help is subject to review and control of Security Council which as Article 24 provides. has the primary responsibility for the maintenance of international peace and security and acts on behalf of the members of the U. N. In the advanced legal order it is prohibited. On the contrary, self-defence is based on the illegality of war. As pointed out by Josef L. Kunz, "Self-defence is a truly juridical institution presupposes an advanced legal order and international self-defence is, therefore, closely bound up with a more advanced international organisation."

Kampuchean issue 1978.—The Kampuchean or Combodian issue is one of the most controversial problems at present in the field of international peace and security. Through a telegram dated 21, December, 1978, the Government of Democratic Kampuchea (i. e. Combodia) drew the Security Council's attention to the various threat to peace, security, independence and stability in South-East Asia which Vietnam and U S.S.R. were creating by their aggression against Demooratic Kampuchea. Thereafter on January 3, 1979. Deputy Prime Minister stated that Vietnam was intensifying to war of aggression against Democratic Kampuchea. He requested for an urgent meeting of Security Council to condemn Vietnam aggression and to take measure to ensure that it ceased its aggression and respected the independence, sovereignty and territorial integrity of Democratic Kampuchea.

American Intervention in Nicargua (1984)—On April 9, 1984, Nicargua filed a case against the Un ted States in the International Court of Justice, charging it with waging "Covert" war to topple the Government. The facts of the case clarify that the present

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problem in Nicargua is due to interventionist policy of the United States. American intervention in Nicargua is a flagrant violation of the basic provisions of the charter of U. N. Like its intervention in Grenada, American Intervention can not be justified on any ground whatsoever. This view finds support and confirmation from the interim judgment given by the International Court of Justice on 10 May, 1984. [For detail study please see answer to question 157/23].

In addition to above interventions, the Intervention of Argentine in Falkland in April 1982, and Intervention of America in Grenada in October, 1983, are also very important to understand the issue.

CHAPTER XVI

STATE AND NATIONALITY

Q. 76. Define and explain "Nationality". Differentiate it from Domicile. What are the different modes of acquiring and losing nationality ? I. A. S. 1956, 1958, 1963, P. C. S. 1968, 1969, 1971 1973.

A. Nationality.—The term nationality in law connotes a status of an individual as belonging to a particular State.

According to *Oppenheim* 'Nationality of an individual is the quality of being a subject of a certain State and therefore its citizen' *Strake* defines it "as the status of membership of the collectivity of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing these individuals."

Nationality is the concern of the Municipal Law of a State and International Law has left every State free to frame its own laws to regulate the acquisition and loss of nationality. The United States Supreme Court in the case of *United States* v. *Wong Kim Ark* (196 U. S. 649) observed : "It is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws what classes of person shall be entitled to its citizenship."

International Law does not prescribe any rules governing the acquisition and loss of nationality. The rule is well-established that the question whether an individual possesses a nationality is to be decided by the Municipal Laws of a State the nationality of which that individual alleges to possess.

As pointed out by Starke, the law relating to nationality have following importance under international law :

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(a) The protection of right of diplomatic agents are inconsequence of nationality.

(b) If a State does not prevent offences of its nationals or allows them to commit such harmful acts as might affect other States, then that State shall be responsible for the acts committed by such a person.

(c) Ordinarily, States do not refuse to take the persons of their nationality. By nationality means loyalty towards a particular State and include the national of a State who may be compelled to do military service for the State.

(d) State can refuse to extradite its own nationals.

(e) According to the practice of large number of States during war, enemy character is determined on the basis of nationality.

(f) States frequently exercise jurisdiction over civil and criminal matters over the persons of their nationality.

Nationality and Domicile.—Domicile of a person means his permanent home Domicile of origin of a person means, the domicile received by him at his birth. Further, the domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parent are residing or the country to which his father belong by race or allegiance, or the country of the infant's nationality.

Distinction between Domicile and citizenship.—Citizenship and domicile are two different concepts. Citizenship has reference to the political States of a person while domicile to his civil rights. (*D. R. Joshi* v. *M. P.*, A.I.R. 1955 S. C. 334 at 337). The Supreme Court quoted with approval the following observations of Lord Westbury in *Udny* v. *Udny* : "The law of England and of almost all civilized countries, ascribes to each individual at his birth two distinct legal status or conditions ; one by virtue of which becomes the subject of some particular country binding him by the tie of national allegiance, and may be called political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain Municipal rights and subject to certain obligations which later character is the civil status of condition of the individual and may be different from his political status. The political status may depend on different laws in different countries whereas the civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend."

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Distinction between Nationality and Citizengship.—[P.C S. 1974 Q. No. 2 (c), P C.S. (1973) Q No. 2 (a)] Often nationality and citizenship are considered to be synonymous of each other. But facts are differed, by nationality under international law we mean, legal relationship which exists between the nation and the individual. Citizen on the other hand, denotes the relations between the person and the State law. Althoug i it is possible that all the citizens may have the nationality of a particular State, but it is not necessary that all the nationals may be the citizen of that particular State. Citizens are those persons who possess full political rights in that State. But a person who possesses only nationality in a particular State may not possess all political rights.

Domicle and nationality are two different legal conceptions which are to be kept apart from each other. The term 'domicile' connotes a relationship between the individual and locality, where he is deemed under law to have his permanent home. Nationality, as already noted constitutes a relationship that exists between the individual and the State to which he belongs or owes allegiance. The individual may not have permanent home in the State of which he is a national. Domicile does not depend upon the membership of a State. No individual has more than one domicile at a particular time. In the case of nationality an individual may have double nationality.

Modes of acquisition of nationality.—International Law recognizes the following modes in which nationality may be acquired :—

1. By birth —Nationality by birth may be acquired on the principle of *jus soli* whereby mere birh on the soil confers nationality or on the principle of *jus sanguinis* by which the nationality of the parents determines the nationality of their children. It may also be acquired on the basis of both the principles ; *jus soli* and *jus sanguins*.

2. By naturalization —"Naturalization is an administrative act of the State, conferring citizenship upon an alien. But there is a rule of general International Law prohibiting the conferring of citizenship upon an alien without his consent. Hence naturalization is admissible only in case the alien applies for it " (*Hans Kelson* Principles of International Law, p 250), (Nottebohm's case, I.A.S. 1964, Naturalisation—P.C.S. 1975).

3. By resumption —Nationality may also be resumed in case it is lost by becoming naturalized abroad.

4. By subjugation.—On subjugation, the nationals of the subjugated territory acquire nationality of subjugating State.

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5. By cession.—The nationals of ceded territory assume the nationality of the State to which the territory is ceded.

Loss of Nationality [P. C. S. 1971],—The International Law recognizes the five modes of the loss of nationality :—

1. By release.—The Municipal Laws of some States allow citizens release from their nationality. If the State agrees to release its national from its nationality, loss of nationality takes place. Germany permits its nationals to ask for release from German nationality.

2. By deprivation.—The loss of nationality by deprivation takes place by force of the Municipal Laws of a State. Certain States have enacted that their nationals would lose nationality if they enter into service of another State without the permission of their home State. The deprivation of nationality may be founded on any ground a State chooses.

3 By long residence abroad.—The loss of nationality may take place on the ground that individual stayed abroad beyond a certain limit of time. Some States have enacted laws under which the citizen loses nationality if he stays abroad more than a prescribed period of time.

4. By renunciation.—A citizen may by a declaration cease to be citizen of a particular State. The renunciation becomes necessary when an individual is the citizen of two States and he has to choose one between two of his citizenships.

5. By substitution.—Certain States have made laws which ordain that on naturalisation the original nationality is lost. The loss of nationality in such a case is substitution—the citizenship of the original State is substituted by the citizenship of naturalising State.

Q. 77 Present a critical essay on double nationality. What consequences flow from double nationality ? What steps have been taken by International law to solve this problem ? (I A.S. 1956, 1958, 1963 ; P.C.S. 1968, 1969, 1973).

A. Double Nationality.—An individual is said to have a double nationality when he is a national of more than one State according to the Municipal Law of those States. Double nationality according to *Oppenheim* may be acquired by the very mode of acquiring nationality. A frequent instance is the case of a woman who, marrying somebody not of her nationality may retain her nationality according to the law of the State of which she is a national and acquire the nationality of her husband according to the law of the State of which her husband is a national. Double nationality may also result from birth in the territory of a State, not the State of

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which the parents are nationals, although usually a minor is given a chance to opt for one or the other nationality on the attainment of majority.

Double nationality may be acquired knowingly or unknowingly, intentionally or unintentionally. Double nationality may be acquired by a child by birth. Every child born in Great Britain of German parents acquires the double nationality of England and Germany. Such a child is national of Britain according to British law and a German national according to the German Law. A similar effect is produced by the legitimation of illegitimate children. The illegitimate child of a German father born in England of an English mother is a British subject. However, if after the birth of the child, the German marries the same English lady and continues to live in England, he legitimates the child according to German law and the child acquires the German nationality as well. Naturalization is in most cases the cause of double nationality. The British Nationality Act of 1948 does not demand in all cases the renunciation of the previous nationality after acquiring the British nationality.

Consequences of Double Nationality.—International Law recognizes that States can claim redress of the wrong done to their national while present on the territory of another State and that no redress can be claimed from a State of which the individual wronged is the national. It is therefore clear that in the case of an individual possessing double nationality the two States each of which claims to be its national cannot claim redress against each other. A third State can treat an individual possessing two nationalities as a subject of either of the two States to which he owes allegiance.

The persons possessing double nationality are put in a very difficult position in time of war. Both the countries whose nationality the individual possesses can claim allegiance.

Cases of double nationality are difficult as complications arising from conflicting allegiance yield to no easy solution.

Solution of the problem of Double Nationality.—The difficulty of the situation arising from double nationality of an individual was sought to be removed by the Hague Convention of 1930 on certain questions relating to the conflict of Nationality Laws. This Convention with a view to resolve the conflict of jurisdiction in case of double nationality, provided for the following rules :—

(1) If an individual possesses nationality of two or more States, it is open to each of the States to claim him as its national.

(2) A State may not exercise its right of protection in respect

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of its national against another State which also claims that person to be its national.

(3) A third State shall recognize only the effective nationality of an individual possessing double nationality. Effective nationality means the nationality of the State to which he is habitually and principally resident or the nationality of the State with which he is most closely connected.

(4) A person who possesses, double nationality without any voluntary act of his own, may renounce one nationality with the permission of the State the nationality of which he desires to renounce.

This probem clamours for agreement among various States on rules relating to double nationality. The Permanent Court of International Justice in its *Advisory Opinion on the Acquisition of Polish Nationality*, (1923) observed that this problem of double nationality can be solved only by international treaties and conventions. The U.N. Law Commission has taken up the matter of double nationality and it is expected that it would in due course bring about a Convention for the elimination of cases of double nationality.

Reference may also be made here to the Universal Declaration of Human Rights 1948. Article 15 (1) of the Declaration provides that every one has the right to Nationality. Article 15 (2) further provides that no one shall be arbitrarily deprived of his nationality. It is very unfortunate that International covenant on Civil and Political Rights, 1965 has not incorporated the right of everyone to a Nationality and the right not to be deprived of one's nationality. The covenant however affirms the right of every child to acquire a nationality.

Q. 78. Write a short note on 'Statelessness'. [I.A.S. 1956, 1959, 1973, P.C.S. 1968, 1975].

A. Statelessness.—An individual is said to be stateless when he does not possess the nationality of any State. Statelessness may occur when an individual on the loss of his original nationality fails to acquire any other nationality. It may occur even by birth when by the Municipal Laws of the State of his birth he is unable to acquire nationality of that State. A Stateless individual cannot get the benefit of the International Law as there is no State which may exercise the right of protection with respect to him. *Oppenheim compares the position of stateless individuals to vessels on the* open sea not sailing under the flag of a State which do not enjoy any protection. In *Stoeck* v. *Trustees* [(1921) 2 Ch. 67] Russel J. quoted with approval, a passage from *Oppenheim* that".....A person may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own."

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The above rule has been followed in *Oppenheimer* v. *Catturmole* (1973) Ch. 264, pp. 270, 273.

The Hague Convention of 1930 may be noted in this connection for it aimed at minimising the possibilities of Statelessness.

(i) In recent times, convention on the reduction of the Statelessness, 1961 is a significant improvement on the provisions of the Hague Convention and goes a long way to remove the number of such persons, who do not possess the nationality of any other State.

(ii) It should also be the duty of the State not to deprive the nationality of persons unless and until there is sufficient cause for it.

(iii) Stateless person should liberally be granted nationality.

(iv) Stateless persons should be conferred upon some rights through international treaties.

In this connection Geneva Convention of the Status of Refugees. 1951 and State of Stateless Persons, 1954 deserve a special mention.

CHAPTER XVII

EXTRADITIONS AND ASYLUM

Q. 79. What is meant by Extradition ? What are the conditions necessary for it ? Illustrate your answer with decided cases. State the present law. (I.A.S- 1973) (C.S.E. 1987, 1988, 1989).

A. Extradition.—With the rise of modern State system and the development of means of travel and communication co-operation in the suppression of crime has become a matter of International concern. It became evident that States must either find a way to administer the penal laws of other States, develop a cosmopolitan system of criminal jurisprudence, or provide for the surrender of fugitives. The first alternative presented the gravest practical difficulties ; the second was obviously Utopian, the third by way, of extradition law developed in International Law long back. "Extradition", according to Oppenheim, 'is the delivery of an accused or convicted individual to the State on whose territory he is alleged, to have committed or to have been convicted of a crime by the State on whose territory the convicted individual happens for the time to be.' Lawrence defines extradition as "the surrender by one State to another of an individual who is found within the territory of the former and is accused of having committed a crime within the territory of latter ; or who having committed a crime

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outside the territory of the latter is one of its subject and as such by its law amenable to its jurisdiction."

Starke defines Extradition as.—"The process whereby one State surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offence."

Necessary conditions.—The recurrence of substantially similar provisions in scores of extradition treaties has led the courts to assert a customary International Law on extradition. The necessary conditions for extradition are as follows :

1. **Political offenders.**—By almost universal practice as manifested in treaties and statutes, States decline to extradite persons to be tried for political or military offences. Whether or not a particular act is a political offence is to be decided in the light of the special circumstances attending it.

2. The criminal demanded should be tried only and exclusively for the offence for which extradition is made and for no other. The famous case of *United States* v. *Rauscher* (1886, 119 U. S. 407) bears testimony to this fact, in which the Supreme Court of U.S.A. quashed the conviction and ordered the release of a prisoner as he was not charged with the offence for which he was extradited.

3. **Military Offences,** e. g., desertion and religious offences are also generally not subject to extradition proceedings.

4. **Double Criminality.**—"The act charged as offence must have been made a crime by the laws of both the requesting and the requested States. The law neither requires the name by which the crimes is described in the two countries shall be the same nor that the scope of liability be co-extensive. It is sufficient that the particular act charged is criminal in both jurisdiction." [*Collins* v. *Loisel* (422) 259 U. S. 312].

5. It is also necessary that the State requested to surrender the fugitive criminal gets an assurance that the individual demanded shall not be tried for any other offence committed prior to his surrender, other than the extradition crime, until he has been liberated and has the opportunity of leaving the country.

6. The formalities laid down in extradition treaties have to be gone into before the offender is extradited. Extradition without formalities sometimes leads to an intricate situation like the one which arose in the well known *Savarkar case* (Scott. Hague Court Reports, p. 276 ; Hudson Case 1038). In this case *Savarkar* an Indian British subject, who was being taken to India in a vessel named

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Morea for the purpose of being there for high treason and abetment of murder escaped on October 25, 1910, when the vessel was in the harbour of Marseilles, he was taken into custody by the French police and was returned to Morea. Since no extradition formalities had been gone into this case the French Government, asked Great Britain to give *Savarkar* back to it. Great Britain refused and by the agreement of the Parties the question was referred to the Court of Arbitration at the Hague. The Court held that International Law did not impose any obligation in such a case on a State which has the custody of the prisoner to resurrender the prisoner on the ground that the original extradition was made without necessary formalities and the Great. Britain was not bound to handover *Savarkar* back to France. This decision was severely criticised by International Jurists who avoured the contention of the French Government.

7. There must be a reasonable *prima facie* evidence of the guilt of the accused. The Harward Research Draft has tried to eliminate the condition of *prima facie case* of guilt prior to extradition. But U. K., U.S.A. and Greece do not agree to this view.

Present law.—Surrender of criminals is thus, more a matter of comity than of right. Each State is guided by treaty stipulation and, in their absence, it has a right to refuse to surrender fugitives by granting them asylum in view of its territorial sovereignty.

Many States such as France, Germany and Italy have adopted the principle of never extraditing their own subjects to a foreign State who return home committing a crime abroad. The Harward Research Draft Convention on Extradition, however, provided that a State shall not refuse to extradite its national, but on refusal it was bound to try its national for the alleged offence committed by him abroad.

The Montevideo Conference of 1933 left the States free to decide whether to extradite their own national or not.

The Indian Extradition Act of 1903 provides procedure for the surrender of the fugitive criminals by the Union Government after being satisfied, on the basis of an enquiry by the Magistrate, that a *prima facie* case has been made out in support of the requisition. They can refuse to apprehend a fugitive criminal if the crime is of a political character.

Sucha Singh's Case.—Sucha Singh was accused of murdering a former Chief Minister of Punjab. After the commision of this crime, he had fled away to Nepal and on the request of the Indian Government, the Government of Nepal extradited him.

Dharam Teja's Case.—Dharam Teja, Managing Director of

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Jayanti Shipping Corporation, committed embezzlement and bungling of crores of rupees and fled away from India. When he was in Ivory Coast, the Indian Government requested the Government of Ivory Coast to extradite him. But Ivory Coast refused to accept this request. Later on when Dharam Teja was in Lonodon, the Government of India requested the British Government to extradite. The British Government accepted the request, because both the countries (India and Britain) are by virtue of Extradition Treaty between them bound to extradite the accused of each other who fled away after committing crimes in either country.

Naval officer Extradition Case (July, 1975).

Elijah Ebrahim Jhirhad of Indian Navy was charged by the Government of India with misappropriating Rs. 13 lakhs while functonting as the Judge Advocate-General of the Indian Navy. But he could not be arrested as he had fled away from the country with his family. He was arrested in New York. The extradition proceedings were initiated against him, the New York court passed extradition order against him.

Narang Brothers Extradition case (October, 1976).

Manoher Narang and his brother Om Prakash Narang who had fled to London, were wanted by the Government of India in connection with cheating, forgery and smuggling. He was arrested in London and was brought before the London court for extradition proceeding. The court allowed the extradition application of the Government of India.

Burmese Student's Case.—Two Burmese Students hijcaked a Thai Airbus with 205 passangers and 16 crew members on board the aircraft. The Students were pursuaded to land at Calcutta airport. The act of hijacking was done to highlight the cause of restoration of democracy in their nation (Burma). The Sixpoint charter of demand included restoration of democracy in Burma along with release of all political prisoners, end of Military rule and direct dialogue with Burmese government. Indian Government refused to handover the hijackers to Burmese or Thai authorities but. charged them under Anti Hijacking Act 1982 and for criminal conspiracy under I.P.C.

New Development.—First week of January 1992 witnessed a new development in the field of extradition treaty between U. K and India during the visit of British Home Secretary, Kenneth Baker. He offered to sign an extradition treaty with India with a view to (i) extradite terrorist and drug traffickers involved in militancy and disruptive, activities leading to terrorism in Punjab and Jammu and Kashmir. This treaty is likely to be signed in near future.

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Q. 80. Define 'political offences'. What is meant by non-extradition of 'political offenders' ? Refer to decided cases.

A. Before the French Revolution the term 'political crime' was unknown both in the theory and practice of the Law of Nations and the principle of 'non-extradition of political criminals' was likewise non-existent. It was indirectly due to the French Revolution that the term 'political crime' first of all arose and Article 120 of the French Constitution of 1793 granted asylum to the foreigners exiled from their home country 'for the cause of liberty'. However, the modern principle of non-extradition of political criminals did non even then get any general recognition from the world.

'Political offences'—Meaning of.—It has proved difficult, however, to draw a clear distinction between political and ordinary offences. Are all attacks upon established Government political offences, whether committed by liberals against an autocrat Government or by radicals against liberal Government ? May the same act bear a different cheracter if committed by an individual singly or as a member of a group ? There are many cases in which political object and personal motive are inextricably tangled. Some writers maintain that in order to constitute a political offence political motive is essential ; other writers call a crime political if it was committed for a political purpose. There are some other writers also who consider that a crime is political if it is committed both with a political motive and for a political purpose.

However, the Harward Researh Draft Convention of Extradition has attempted a suitable definition of political offences. Article 5 provides....."the term 'political offence' includes, treason, sedition and espionage, whether committed by one or more persons, it includes any offence connected with the activities of the organised group directed against the security of Government system of the requesting State ; and it does not include other offences having a political objective."

Cases—

Re Meunier, (1894) 2 Q. B. 415—Meunier was an anarchical and was proved to have caused two explosions in Paris Cafe. Since he was opposed to all Governments and his anarchial efforts were directed against the general body of citizens, his offence could not be treated as an offence of a political character. Justice Cave said, "It appears to me that in order to constitute an offence of political character there must be two or more parties in the State each seeking to impose Government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not." This naturally excludes anarchists and terrorists.

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Haya dela Torra's case [I.C J. Reports (1951) p. 71]. *Haya dela Torra*, a political leader of Peru, having instigataed a military rebellion escaped to Lima and got asylum in Columbian Embassy. The I C.J. held that, no doubt, Havana Convention provided for the extradition of common criminals but it, however, had no regard to political offenders.

Q. 102. What are the rational considerations which have conditioned the law and practice as to extradition ? Discuss.

[P. C. S. 1970]

A. With the increasing rapidity and facility of Intenational Transport and communications, extradition began to assume prominence in the modern time.

The following rational considerations have conditioned the law and practice as to extradition—

(i) The general desire of all States to ensure that serious crimes do not go unpunished. Frequently a State in whose territory a criminal has taken asylum cannot prosecute or punish him purely because of some technical rule of criminal law or for lack of Jurisdiction. Therefore, International law, applies the maxim, "*ant punite ant dedere*', *i. e.*, the offender must be punished by the State of refuge or surrendered to the State which can and will punish him.

(ii) The State on whose territory, the crime has been committed has best ability to try the offender because the evidence is more freely available there, and that State has the greatest interest in the punishment of the offender, and the greatest facility for ascertaining truth.

Q 181 What do you understand by 'asylum' in international Law ? Discuss the law relating to asylum with appropriate cases and instances. (I. A. S. 1969, 1971, 1974, P. C. S. 1970). (C. S. E. 1987).

A. Meaning of asylum.—The conception of asylum in International Law involves two elements—

(a) shelter, which is more than merely temporary refuge ; and

(b) a degree of active protection on the part of the authorities in control of the territory of asylum.

Its types.—Asylum may be (1) territorial (or internal), i.e., granted by a State on its territory, or it may be (2) extra-territorial i.e., granted for and in respect of legations, consular premises, international headquarters, warships, and merchant vessels to refu-

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gees from the authorities of the territorial States. The differences between the principles applying to the kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself whereas the granting of extra-territorial asylum is rather a derogation from the sovereignty of the territorial State in so far as that State is required to acquiesce in fugitives from its authorities enjoying protection from apprehension.

Every State has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard while the right to grant extra-territorial asylum is exceptional and must be establisehd in each case.

Both types of asylum involve an adjustment between the legal claims of State sovereignty and the demands of humanity.

1. **Territorial Asylum.**—A State's liberty to grant asylum in territory is of ancient origin and extends not only to political, social or religious refugees. but to all persons from abroad, including criminal offenders it is merely one aspect of a State's general power of admission or exclusion from its territory. The popular upsurge against the Pakistani tyranny was being crushed by Pakistani Government by all means of cruelty and torture at their disposal. Therefore, millions of refugees fled to India India granted political refuge to these people.

The United Nations Conference on Plenipotentiaries on territorial Asylum was held at Geneva in February, 1977 for the purpose of adopting Convention on Territorial Asylum, but it could not be adopted because of the lack of consensus.

2. **Extra territorial Asylum.**—**(a) Asylum in legation.**—Modern International Law recognises no general right of head of mission to grant asylum in the premises of the legation. Such grant seems rather prohibited by International Law where its effect would be to exempt the fugitive from the regular application of laws and administration of justice by the territorial State.

Exceptionally, asylum be granted in legation premises—

(i) As a temporary measure, to individuals, physically in danger from mob disorder or mob rule, or where the fugitive is of peril because of extreme political corruptiou in the local State, the justification being presumably that by the grant of asylum, an urgent threat is temporarily tided over.

(ii) Where there is a binding local custom, long recognised, that diplomatic asylum is permissible.

(iii) Under a special treaty, (usually allowing such right in

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respect of political offenders only) between the territorial State and the State which is represented by the legation concerned.

(b) Asylum in consulates or consular premises.—Simple principles subject to the same exceptions, apply as in the case of legation premises.

(c) Asylum in the Premises of International institutions.—The Headquarters Agreement of the United Nations and of specialized agency reveal no right of international institutions to grant asylum or even refuge in their premises to offenders as against the territorial State, and semble not even a right of protection on humanitarian grounds.

(d) Asylum in warships.—Some authorities maintain that individuals who do not belong to the crew, and who after committing a crime on shore, board the vessel in order to take refuge, cannot be arrested by the local authorities and removed from the vessel if consent to this course is refused by the commander, of the ship. Where such consent is refused the local authorities have their remedy through the diplomatic channel against the Government of the flag State. On the other hand, several authorities such as C J. Cockburn, W. Scott and Lord Stowell have expressed the view that such fugitive criminal should be given up to the local police. Possibly, asylum may be granted on humanitarian ground, in case of the extreme danger to the individual seeking it.

(e) Asylum of merchant vessels.—Merchant vessels are not exempt from the local jurisdiction, and therefore cannot grant asylum to local offenders.

Q 82. (a) "Asylum stops as it were, where extradition begins ....."—(Starke) Comment.

(b) Is it correct to say that a fugitive have a right of asylum ? Give reasons.

(c) Examine in the light of rules of International Law whether India was justified or not in giving asylum to Dalai Lama.

(d) 'No right to extradition exists apart from treaty'. Discuss.

A. (a) The liberty of a State to accord asylum to a person overlaps to a certain extent with its liberty to refuse extradition of him at the request of some other State, an overlapping best seen in the grant, commonly, of asylum to political offenders who correspondingly are not as a rule extraditable. When criminal or an accused person enters the territory of a State, it may grant him asylum or extradite him to the aggrieved State which seeks extradition. If the State grants asylum the matter ends there but if it adopts latter

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course the asylum is simply temporary and as soon as the fugitive is extradited, the asylum comes to an end. Hence it is correct to say that asylum stops where extradition begins.

(b) It is sometimes said that a fugitive has a right of asylum. Judge Lauterpacht has suggested that there is such an individual right because the fugitive is not usually surrendered, in the absence of an extradition treaty, and because if is offence his political, he is not generally subject to extradition It is submitted that fugitive have no enforceable right in International Law to enjoy asylum either by grant from the State of refuge, or by acquiescence as against the pursuing State. The only international legal right is that of a State to refuge itself to grant asylum. Municipal legal system (for example, the Constitutions of France and Italy) do indeed sometimes provide for a right of asylum to individuals fleeing from prosecution, and an example of a modern International instrument (not being a binding convention) providing for an individual right of asylum from persecution is the Universal Declaration of Human Rights, 1948 (Article 14). But so far no such individual right is guaranteed by International Law, although proposals to secure recognition of these rights are under consideration by the United Nations.

(c) In the year 1959 Tibet saw much bloodshed at the hands of Chinese armed forces. The popular upsurge against Chinese tyranny was being crushed by Chinese Government by all means of cruelty and torture at their disposal. Seeing these atrocities and fearing persecution the head of Tibetan State, Dalai Lama, fled to India for refuge along with his few followers. Indian Government granted asylum to Dalai Lama and guaranteed his safety. China took it as an act of hostility. The wild arguments of China do not find support from the existing rules of International Law India was perfectly justified in granting asylum to Dalai Lama. It is its sovereign right which cannot be challenged by China or by any body else. There was, and slill is, no extradition treaty between India and China which would have deterred India from-granting asylum to Dalai Lama. India's action, though it may be politically unwise, was perfectly right in the eyes of International Law.

(d) It is an established principle of International Law that no right to extradition exists apart from treaty. In modern times with quick means of communication and transportation every State feels the necessity of entering into extradition treaties with other States. The question whether extradition will take place in a particular case has to be decided on the terms and conditions laid down in the treaty. Although sometimes extradition takes place on the basis of international comity in the absence of a treaty providing for extradition a State has no right to demand extradition merely on the basis of comity. There is no rule of customary International Law

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which imposes an obligation on States to allow extradition. It is for the States to enter into treaties among themselves for the purpose of extradition. Such treaties are bilateral in their nature and provide for conditions under which extradition can take place.

Influx of Refugees from Bangla Desh.

In 1970 a large number of the influx of the refugees from the erstwhile East Pakistan had caused a great controversy. The act of India of granting shelter to those refugees was justified under Articles 31, 32 and 33 of the Refugee Convention of 1951. The influx of refugees from Bangladesh was due to political crimes, India was not guilty of violating International law.

CHAPTER XVIII

DIPLOMATIC AGENTS

Q. 83. What do you understand by the right of legation? What are the different classes of diplomatic envoys? Describe the functions of diplomatic agents. (P.C.S. 1970, 1975).

A. Right of legation—The right of legation or the right of representation is the right of a State to receive and send diplomatic envoys. The active right of legation means the right of a State to send its diplomatic envoys to another State. The passive right of legation is the right to receive a diplomatic envoy of another State. A State which sends and also receives diplomatic envoys exercises both the active and passive right of legation.

The right of legation belongs to full sovereign States and to the United Nations. Whether or not Member-State of a Federal State has a right of legation is to be determined by the provisions of the Constitution of the Federal State. The British Self-governing Dominions have a right of legation. It may be noted here that Indian Parliament passed the Diplomatic Relations (Vienna Convention) Act, 1972, to give effect to the Vienna Convention on Diplomatic Relations, 1961 and to provide for matters connected therewith. Thus, the law relating to the diplomatic and consular affairs remains the strongest section of international law.

Classes of diplomatic agents.—The diplomatic agents have been classified according to their status and functions. The first classification of diplomatic agents was made in the Congress of Vienna, 1815 as follows :

1. Ambassadors, Legates or Nuncios.
2. Ministers Plenipotentiary ; and Envoys Extra-ordinary.
3. Charge d' Affairs.

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The classification according to rank was however slightly disturbed in 1848 by the Congress of *Aix la-Chapelle* which introduced another class, namely, Ministers Resident to rank between the Ministers Plenipotentiary and *Charge d' Affairs.* The classification has been maintained till to-day so that we find the following classes of diplomatic agents that are accredited to States :—

1. **Ambassadors.**—These belong to the first class and take precedence of all other envoys. They are accredited by the Holy See, the United Nations and States enjoying royal honours. The ambassadors accredited by the Holy See are known as Nuncios or Legates. The ambassadors are entitled to claim the title of 'Excellency' and to ask for at all time audience with the heads of the States.

2. **Ministers Plenipotentiary and Envoys Extra-ordinary.**—These come next in rank to Ambassadors. They do not enjoy such honours due to Ambassadors.

They may be diplomats for special mission and representatives appointed in International Organisation for the purposes of envoys on special mission, the General Assembly of United Nations adopted conventions on special Mission in 1969 which would come in force after the ratification by 22 States. Till March, 1977 only two States have accepted it. These envoys could be appointed with the consent of the receiving State and their immunities and privileges differ in certain respect with the general envoy. They can travel in the receiving State only those areas in which their functions warrant. If they involve in accidents, such accidents, are not deemed to be outside the civil and criminal jurisdiction of the receiving State.

3. **Ministers Resident** —Their rank is lower than that of the Ministers Plenipotentiary. They do not enjoy any title even by courtesy.

4. **Charge d' Affairs.**—They are accredited not by the heads of that State like the first three classes of diplomatic agents but by the foreign office of State, which they represent. They rank below Ministers resident.

Functions of diplomatic Agents.—Besides those, with which a permanent envoy has been specially charged by the State accrediting him, there are some regular functions which he must discharge. According to Article 3 of Vienna Convention, the functions of diplomatic mission consist *inter alia* in (a) representing the sending State in the receiving State ; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law ; (c) negotiating with the government of receiving State ; (d) ascertainment by all lawful means

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conditions and developments in the receiving State ; (e) promoting friendly relations between the sending State and receiving State. In addition to these functions diplomatic agents have also to perform any special functions which are allotted to them from time to time. The diplomatic agents which are appointed only for specific functions perfom only those functions.

Q. 84 (a) What are the various causes leading to the termination of diplomatic mission ?

(b) Can a State refuse to receive a particular envoy ?

A. (a) Termination of Diplomatic Mission.—The cause leading to the termination of the diplomatic mission are :—

1. Death of the diplomatic agent.

2. Recall of the diplomatic envoy by his accrediting State. In certain circumstances, the recall of an envoy has the gravest signification ; for example, where it is intended to warn the receiving State of the accrediting State's dissatisfaction with their mutual relation Such a step is only taken where the tension between the two States cannot otherwise be resolved.

3. Dismissal of diplomatic agent.

4. Breach of diplomatic relations.

5. Constitutional changes.

When the sovereign head of the sending or receiving State dies or abdicates the mission ends. If the mission is to continue fresh letters of credence will be required to be issued.

6. **Revolutionary changes in the Government.**—Changes in the Governments of the sending and receiving State brought about by a revolution put an end to diplomatic missions.

7. Extinction of the State either by annexation or merger.

In case of extinction of either the sending or the receiving State the diplomatic mission is terminated.

8 **War.**—War leads to rupture of diplomatic relations and the mission terminates on war taking place between the two States.

9. **Request for passport.**—A diplomatic agent may on the ground that he has been ill-treated by the receiving State ask for his passport and depart. The request for a passport terminates the mission.

10. Change in the rank of the diplomatic agent.

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11. Accomplishment of the purpose of the mission.

12. Expiry of time.

13. Demand of recall of the envoy accredited by the receiving State on the ground of misconduct.

(b) A state may refuse to receive a diplomatic envoy in the following cases ;

1. If for any reason, he is personally obnoxious to the sovereign or head of the accredited State.

2. If by his public pronouncement or otherwise he has shown himself avowedly hostile to the people or institutions of the accredited State.

3. If he happens to be a subject of the accredited State itself and that State refuses to grant him the diplomatic immunities.

The State declining to accept the envoy is not compelled to specify its objections to the accredition or justify them. The case of Mr. Keiley affords a good illustration of the exercise of this right of refusal. Mr. Keiley was accredited by the United States of America to Italy which refused to receive him on the ground that Mr. Keiley had some years before his appointment protested against Italy's annexation of Papal States. Mr Keiley was then accredited to Austria which also refused to receive him on the ground that Mr. Keiley has a wife who was a jew. As the accrediting State has no right to demand reception of a particular individual as diplomatic agent, the United States after protest had to acquiesce in the refusal. The practice that has now grown up is to enquire of the foreign State whether they would accept a particular individual as diplomatic agent. If the foreign State makes no objection the proposed individual is accredited to that foreign State. Thereafter the foreign State cannot refuse to receive such an accredited agent.

Q 85. What are the diplomatic immunities ? Discuss their general nature and the extent to which they are available. [I. A. S. 1954, P. C. S. 1969, 1971, 1975, C. S. E. 1987.]

A. One of the pillars of modern International Law is the diplomatic immunities of the Ambassadors. The immunities and privileges which diplomatic Agents enjoyed are as follows—

Personal safety.—"The person of a public minister is sacred and inviolate. Whoever offers any violence to him, not only affronts the Soveriegn he represents, but also hurts the common safety and well-being of nations ; he is guilty of crime against the whole world"—*Respublice* v. *De Longchamps*. International Law takes

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serious view of any violation of the personal immunity enjoyed by the envoys. Many States have framed laws which severely punish persons acting in violation of this rule of protection. The foreign State to which diplomatic envoy is accredited has a duty to take immediate steps to prosecute the offender.

Illustrations

(i) *X*, a foreign diplomat in Delhi took a private house on lease. On his failure to pay rent, the landlord filed a civil suit for the recovery of rent as well as possession of his house. '*X*' pleads diplomatic immunity. In this case exemption from the civil jurisdiction of the country is complete in so far as is necessary to secure complete freedom in the performance of their official duties only. Article 31 of Viena Convention on Diplomatic Relations States that the immunity is not available in respect of a real action relating to the private immovable property situated in receiving State unless he holds it on behalf of sending State.

(ii) '*K*' an Indian is a high official in the French Embassy in India. He caused physical injuries to a Frenchman who visited the embassy for personal work. Will '*K*' be entitled to diplomatic immunity in Indian Courts against criminal proceedings ? (C. S. E. 1985).

The answer is yes as in the case of United States Diplomatic and Consular Staff in Tehran (I. C. J. Reports (1980) p. 3) International Court of Justice replied the similar question in affirmative. [P. C. S. 1990].

The United States adopted International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973 to deter the commission of offences against internationally protected persons. It came in force in February 1977 after having received requisite ratifications.

2. Immunity from criminal jurisdiction.—Diplomatic agents are exempt from criminal jurisdiction of the foreign State. The diplomatic envoys cannot be prosecuted by the courts of the receiving States. The immunity is enjoyable by them so long as they do not disturb the internal order of that State. While International Law grants them immunity from criminal proceedings it also requires the envoys to obey the Municipal Law of the State to which they are accredited. A diplomatic agent conspiring against the State to which he is accredited will lose his immunity temporarily and is liable to be expelled. The example of George Gyllenborg 1712, may be cited in this connection. He was an Ambassador of Sweden

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in England and was arrested on the charge of conspiracy against George I, the King of England.

3. **Immunity from civil jurisdiction.**—A diplomatic agent is not liable to be sued for a debt or any other contract or for tort of any kind. Many countries have passed laws which prevent the issue of civil processes against diplomatic envoy. This exemption from civil jurisdiction continues till he leaves the foreign State.

A diplomatic envoy cannot be arrested for his debts. His property also cannot be seized or attached in payment of his debts. He cannot be summoned in the courts of the receiving State as a witness.

The immunity from civil jurisdiction is subject to waiver. If the person claiming privileges is of a lesser rank than the head of the legation the waiver must be of a superior enovy of his Government, but there is probably a presumption that in submitting to jurisdiction, such a person was acting on instructions to this effect. (C. S. E. 1989).

4. **Immunity connected with residence.**—The residence of a diplomatic person is in ordinary circumstances inviolable. If it should be necessary to arrest in a legation some person not himself immune from arrest, the proper course is to ask the minister to surrender him or to consent to the arrest, and it is the minister's duty to accede to such a request, since he may not turn his residence into an asylum for fugitives from the local justice. Still less may he himself assume powers of jurisdiction within the legation.

5. **Exemptions from being Presented as witness.**—A diplomatic envoy cannot be made to appear as witness in any civil, criminal or administrative court of the receiving State. The envoy may waive this privilege by appearing himself as a witness before a Court.

6. **Exemption from taxation.**—International Law exempts envoy from all direct personal taxation such as income-tax and the like. As regards rates, the rule is that an envoy is exempt from poor rates, and the like but he is not exempt from those local rates which are levied on the use of certain local subjects. The envoy is also liable for house-tax or other taxes on property. But on the ground of comity local rares and taxes on property are not generally imposed on the envoys.

7. **Exemption from police regulations.**—An envoy is not subject to local police and he is not bound by the police orders or regulations which interfere with the exercise of his official duties. But in the interest of maintenance of public order of the locality, he is expected to obey the police regulations.

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8. The right of private chapel.—A diplomatic envoy has a right to have his private chapel inside his official residence for his religious worship.

9. Right to exercise jurisdiction.—The official's residence and the members of the suite of an envoy enjoy exterritoriality. The jurisdiction of the receiving State being excluded, the envoy has a right to exercise his jurisdiction over his retinue. He has a right to arrest a member of his suite and to send him for trial to the home-State.

Immunity of envoy's retinue.—The retinue of an envoy consist of :

1. Official and other servants of the legation.—They enjoy the same inviolability and exemption as are enjoyed by the envoys themselves. They are liable to taxation as held in *Macartney* v. *Garbutt*, [L. R. 24 Q. B. 368] where a secretary attached in Chinese legation who was a British subject was allowed exemption from parochial rates.

2. Relative of the envoy.—The wife of the envoy has the same immunities and privileges as the envoy. The children of the envoy as well as other members of his family who live with him are exempt from civil and criminal jurisdiction.

3. Private servants of the Envoys.—According to *Oppenheim* the rule is that all persons in the private service of the envoy whether they are subjects of receiving State or not are exempt from civil and criminal jurisdiction but the envoy may disclaim these exemptions. According to *Fenwick* the exemption may be waived by the minister at his discretion.

4. Courtiers or dispatch bearers.—They are officially connected with the embassay and enjoy exemption from civil and criminal jurisdiction and are granted special protection which is necessary for the discharge of their duties of a special character. They are usually granted special passports and have a right of innocent passage through third States.

Indian Position :

The Parliament of India has passed Diplomatic Relations (Vienna Convention) Act, 1972 to give effect to the Vienna Convention on Diplomatic Relations, 1961. Section 9 of the Act lays down that for the purpose of Article 32 of the Convention, a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to a waiver by that State.

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Q. 86. Discuss briefly the functions, principles and immunities of consuls.

A. Consuls.—A consul is not a diplomatic agent but simply an agent whose main function is to protect the commercial interests of his appointing State in foreign countries. Consuls are not representatives of their States and are not accredited to foreign States. They do not enjoy International status and the duties that they perform are merely domestic. Their position under the conditions of modern International trade is of a great utility and importance.

Grades of consuls.—According to *Oppenheim*, there are four grades of consuls. In order of rank they are :

(i) Consuls general.—These belong to the first rank and are appointed as the head of several consular districts or of one big district.

(ii) Consuls.—They come next in rank and are deputed to small districts.

(iii) Vice-consuls.—They act as assistants of the first two grades of consuls. In some States they are appointed by Consuls.

(iv) Agents consular.—They belong to lowest rank and are appointed by Consuls-General or Consul subject to the approval of the home Government. They perform minor consular functions.

Appointment of Consuls.—Consuls take their appointment through a patent or commission known as '*latter de provision.*' The State to which Consul is sent admit him by a grant of Exequatur.' A Consul cannot exercise his functions before he has handed over his patent to the foreign State and has received it's exequatur.

Functions of Consuls.—The generally recognised functions of a consul are :

(1) He has to keep a vigilant eye over the commercial interests of appointing State. He has to make reports from time to time about commercial trend and events. He has also to see it commercial treaties existing between the admitting State and the appointing State are given their full effect.

(2) He exercises supervision over the navigation of the State. If he is stationed at a port he has to keep a watch over all merchantmen sailing under flag of the appointing State, to assist vessels in distress, and to settle disputes between a vessel's master and its passengers.

(3) He has to exercise functions for the protection of the subjects of the appointing State. His protecting functions are of

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various kinds. He has to assist the subjects of the appointing State in getting passports, helping them in litigation before the court and advising them on various matters.

(4) He exercises notarial powers which consist in attesting signatures, examining witnesses for the courts of the appointing State, authenticating documents and testamentary dispositions of the subj cts of the appointing State. He registers marriages of the subjects of the appointing State, legalises their adoptions, registers births and deaths.

Consular privileges.—As already noticed, Consuls are not diplomatic representatives of the States. They are mere agents or officers of one State sent to another State for the performance of certain functions. They do not represent their appointing States in the totality of International relations. They cannot therefore, enjoy those privileges and immunities which are conceded by the States to diplomatic agents. But because they have a recognised public character and are custodians of certain material interests of their appointing States on the foreign territory, they receive special protection. They do not enjoy immunity from civil and criminal jurisdiction of the receiving States. [*Vivash* v. *Brakar*, 3 M. & S. 284 ; *Fention Textile Association* v. *Krassin*, 38 Time LR 259 (1921)].

Starke has remarked, "The modern tendency of the States is to amalgamate their diplomatic and consular services and the impact of this tendency, the present difference between diplomatic and consul privileges may gradually be narrowed."

CHAPTER XIX

TREATIES

Q. 87. Explain the nature and functions of treaties ? Discuss in detail. (I. A. S. 1967) (C. S. E. 1986 P. C. S. 1990).

A. According to Starke, a treaty is an agreement whereby two or more States establish or seek to establish a relationship under International Law between themselves. So long as it attests an agreement between States, any instrument or document may be a treaty irrespective of the form with which the text is clothed. Lauterpacht defines International treaties as "agreements, of a contractual character between States, or organizations of States creating legal rights and obligations between the parties." As a matter of fact, the term "treaty" may be regarded as *nemen generalissimum* in the Code of International law, and can include an agreement between International Organisations *inter se*, or between an International Organisation on the one hand and a State or States on the other hand.

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Article 2 (l) (a) of the convention defines treaty as an international agreement concluded between States in written form and governed by International law.

It may be noted here that in 1982, the General Assembly requested the Secretary General to submit a report of the draft articles on the Law of Treaties between States and International Organisations adopted by the International Commission. Later on the General Assembly decided that an International convention should be concluded on the basis of draft articles adopted by the International Commission.

Almost in all cases, the object of a treaty is to impose binding obligations on the States which are parties to it, Many writers on the theory of International Law have put the question—Why do treaties have such binding force? Perhaps the only answer to this query is that International Law declared that duly made treaties create binding obligations for the States parties.

It has to be remembered that treaties proper must be distinguished from a contract between a State and an alien citizen or corporation. Starke says that future of law and practice of treaties will have to include rules relating to agreements on international matters made by Internatianal institutions whether *inter se*, or with States, or perhaps even with individuals. With the establishment of the United Nations and the "specialised agencies," the number of such transaction is rapidly increasing.

Vienna Convention on the Law of Treaties, 1969.—In view of the significance of law of treaties, the International Law Commission decided in 1949 to attempt its codification in Draft Convention on the Law of Treaties. The Commission completed its work in 1963. The United Nation's Conference on the Law of Treaties adopted the Vienna Convention on the law of treaties.

Q. 88. What are the various kinds of treaties in International Law? Explain the Law with regard to their formation, termination and interpretation.

A. Classification of Treaties.—Professor Mc-Nair in the British Year Book of International Law classifies the treaties as follows.—

(1) Treaties having the character of conveyances.

(2) Treaties having the character of contracts.

(3) Law making treaties, sub-divided into :

(a) Treaties creating constitutional law e. g., the statute of the Permanent Court of International Justice (Now the International Court of Justice);

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(b) Pure law making treaties e. g., the several labour conventions negotiated by the International Labour Organisation.

(4) Treaties akin to Charter of Incorporation, e. g. treaties which established the International Postal Union, 1874. *Oppenheim* classifies treaties into law-making treaties and those treaties concluded for any other purpose. But such a distinction, he observes, rests merely on the basis of convenience. *Vattel* classifies Treaties as equal and unequal, real and personal.

Bilateral and Multilateral Treaties.—Writers have drawn a distinction between the functions of a bilateral treaty and those of a Multilateral treaty. A bilateral treaty is an agreement between two States while a Multilateral treaty has more than two States as its parties, multilateral treaties are either political or non-political and are law-making treaties. Treaties may also be unilateral when they bind one party only.

Multilateral Treaty Procedures.—On 8 December, 1977, the General Assembly of the United Nations requested (through resolution 32/48) the Secretary-General to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties, taking into consideration the debates at the Thirty-second Session of the Assembly. As per resolution, the Secretary-General will also take into account the observations of International Law Commission to be received by 31st July, 1979 with a view to submission of the report to the Thirty-fourth session. That a session would have in its provisional agenda the item Review of the Multilateral treaty making process.

Parties competent to make treaties.—Contracting parties to a treaty are States. To make a treaty is an incidence of sovereign and all full sovereign States have unlimited power of making treaties on any matter, States which do not possess full sovereignty or which are not full sovereign States can make treaty only if they are authorised under their Constitution. In a confederation or a federation the right of States to enter into treaties flow from the Constitution.

It should be noted in this connection that though the treaty making power is the attribute of State sovereignty, international persons other than States also have treaty making power. For example, the U. N. O. has got treaty making power.

Free Consent.—A treaty gets its binding force from the consent of the parties. A consent obtained by intimidation or coercion is no consent in law. Obviously, a treaty which is concluded under duress and coercion would be invalid. The earlier rule laid down that a treaty imposed upon by the victor as a result of war was

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a good treaty and that it could not be disregarded as having been made either under duress or coercion. *Grotius* maintained that such treaties were valid. *Hall* took the view that force and intimidation which were legitimate means of getting redress for the wrong could not vitiate the agreement.

The various steps in the formation of a treaty according to Starke are—

(1) The accrediting of persons who conduct negotiations on behalf of the contracting States.

(2) **Negotiation and adoption.**—Recently, the Soviet Union has agreed in Principle to regional negotiation to solve the crisis caused by its military intervention in Afghanistan, the Iranian Foreign Minister Sadaqi Otbzadeh stated his view. [March 26, 1980 : Northern India Patrika].

(3) Signature.

(4) Ratification.

(5) **Accession and adhesion.**—In practice when a State has not signed a treaty, it can only accede or adhere to it.

Sometime it happens that after a treaty has been concluded, other State accepts it or accede to it. If such a State accepts a treaty in toto, it is called accession. In case a State accepts a treaty in part only, it is called adhesion.

(6) Entry into force.

(7) Registration and publication.

(8) Application and enforcement.

Termination of treaties.—Treaties may be terminated in the following ways :

1. **Termination of treaties by operation of law.**—(i) Extinction of either party to a bilateral treaty by annexation or merger may discharge the instrument. Thus when America entered into a treaty with Tripoli, in 1905, it was terminated by the Italian annexation of Tripoli in 1911.

(ii) Treaties may cease to operate on the outbreak of war.

(iii) Treaties may be discharged as a result of the *rebus sic stantibus* doctrine. A treaty may become null and void in case there is a fundamental change in the state of facts which existed at the time the treaty was concluded. But, "it is generally agreed that the clause *rebus sic stantibus* may only be resorted to in very exceptional circumstances, and that certainly not every change of circumstances justifies a State in making use of it."

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(iv) A treaty specifically concluded for a fixed period of time, for example, five years, terminates on the expiration of that period.

(v) If successive denunciations of a treaty reduce the States parties to less than the number provided for by the convention, the treaty ceases to be in force.

2. Termination of treaties by act of parties —(i) States parties to a treaty may terminate it by mutual agreement.

(ii) A State party may terminate its treaty obligations by act of denunciation.

(iii) *Jus Cogens* or Emergence of new Peremptory Norm of General International Law :—According to Article 64 of the Vienna Convention, if a new peremptory norm of general international law emerges any existing treaty which is in conflict with that norm becomes void and terminates.

Q. 89. Discuss 'reservation' in treaties and revision of treaties. (I.A.S. 1969, C.S.E. 1986).

A. Reservation in treaties.—There is a great controversy in regard to the reservation in the modern period. There are few aspects of the Law of Treaties which have generated greater controversy in past 20 years than the question of Reservation to multilateral conventions. Article 2 (1) of the Vienna Convention on the Law of Treaties, 1969 defines 'reservation' as follows :—

"Reservation is a unilateral Statement.....made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State".

A State may often wish to sign or ratify or accede to treaty in such a manner that certain provisions of the treaty do not bind it or apply to it subject to modifications. This can be effected in two ways only, i.e.,

(1) by express provision in the treaty itself, or

(2) by a reservation made in a proper manner and accepted by the other parties.

A reservation may be defined as a formal declaration by a State made when signing, ratifying, or acceding to a treaty, whereby as a condition of its willingness to become a party to the treaty it stipulates for exemption from one or more provisions of the treaty, or the modification of these provisions of their effect or the inter-

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pretation of the provisions in the particular way. A declaration by a signatory as to how the treaty will be applied, which does not vary the obligations of that signatory *vis-a-vis* other signatories, is not however a true reservation. Like the powers of withholding ratification, the privilege of making reservation is regarded as an incident of the sovereignty and perfect equality of States. It is felt preferable that States which cannot accept certain provisions should participate in the treaty, even if only in a limited way, rather than that they should be excluded altogether from participation.

As a matter of fact, a State when making reservation of the time of signature can do so only with the consent of other States signatories ; otherwise the whole object of the treaty might be impaired. Sometimes the intention to make reservation is announced at some session or other of the Conference and the reservation are then and there agreed to by the delegates, but in principle in such an "embrov" reservation should be confirmed in the subsequent signature, ratification, acceptance, approval or succession, or at least in the formal minutes of the proceedings.

Revision of treaties.—The revision of treaties is now more than merely technical question since well meaning, though uninstructed public opinion, has erected it into a first class political problem. When a treaty has finally disposed of a territory, no question of 'revision' can arise ; if the territorial situation needs to be readjusted by taking territory from one State and giving it to another, a new treaty needs to be concluded, and this is a question not of law but of politics. The term 'revision' is only appropriate in the case of treaties imposing continuing obligations on States, which obligations may need to be modified in the light of new conditions. The most useful way of ensuring reconciliation of executory treaties with changing conditions is through revision clauses inserted in the treaties or conventions concerned.

According to the revision clauses, the exact time at which the revision may be made falls broadly speaking into four classes :—

(a) at any time ;

(b) after the expiration of a prescribed dating from the entry into force of the convention ;

(c) periodically at the expiration of prescribed periods ; and

(d) combination of two or more of the proceeding clauses.

Q. 90. Describe the various documents which though not actually treaties resemble treaties and are regarded as such.

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Or

Explain the maxim 'pacta terties nec nocent nec prosunt'. Are there any exceptions to it ?

Or

"As a general rule a treaty may not impose obligations or confer rights on third parties....."—(Starke). Comment. (C.S.E 1986).

A. The maxim explained.—It is a fundamental principle of the law of contract that only parties to a contract are bound by the contract. Similarly it is a general principle of International Treaty that only parties to an International Treaty are bound by it. This general principle is expressed in the Latin maxim *Pacta terties nec nocent nec prosunt*, and finds support in the practice of State and in the decision of international tribunals. The maxim is based on very sound principle. Each State has an alienable right of not to be dragged into the transactions without its consent and bear the consequent burdens or enjoy the privileges thereof. If any thing is imposed against the wishes of a State, it amounts to a clear affront to its sovereignty.

Exceptions.—However, it should be borne in mind that the maxim is not without its own limitations. Starke, points out the following exceptions to it :

1. Treaties effecting an international settlement on conferring an international status on ports, water-ways, etc. may reach out to States non-parties. The best illustration of this is the Convention of 1850, between France, Great Britain and Russia, concerning the non-fortification of the Holand Island. In 1920, Sweden, a non-party, insisted that the provisions of the convention should be complied with, and finally it was agreed that the benefits can be extended to non-contracting parties also.

2. Multilateral treaties declartory of established customary International Law will obviously apply to non-parties, but the true position is that non-parties are bound not by the treaty but by the customary rules, although the precise formulation of the rules in the treaty may be of significance.

3. Multilateral treaties creating new rules of International Law and ratified by all, or almost all the Great powers, will bind non-parties in exactly the same way as do all rules of International Law. In this connection, a useful reference may be made to the Briand-Kellog Pact of 1928 for the Outlawry of War which under the Nuremberg Judgment of 1946 was regarded as creating general law for signatories and non-signatories alike.

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4. Certain multilateral Conventions, which are intended to have universal operation, may provide in terms for their application to non-parties. Thus, the Geneva Drugs Convention of 1931 enables an international organ known as the Supervisory Body finally to determine the estimates for legitimate drug requirements of States which are not parties to the Convention. Moreover, if a State non-party exceeds these estimates by obtaining or producing larger supplies of drugs, it becomes liable to an embargo on imports in the same way as States who are parties.

Q. 92. Write critical notes on—

(a) Full Powers.

(b) Ratification.

A. (a) Full Powers.—The first step towards the conclusion of the treaty begins with negotiations. It may. however, be noted that negotiations are generally carried on by the representatives of the States. The representatives, before they commence negotiations, are to be authorised by their respective States. The instruments by which the representatives are authorised are known as Full Powers which are signed by the head of the States in case the treaty contemplated is one which will be on behalf of the head of the State, and which are given by Ministers of Foreign Affairs if the treaty is in another form. In case of bilateral treaties each of the representatives show their Full Powers to the other and negotiations begin. In the case of the multilateral treaties which are concluded in the conferences the Full powers are given to the Committee of Full Powers which is set up for the purpose of making report about the Full Powers which representatives have brought with them. The Committee of Full Powers scrutinizes the Full Powers of each of the representatives and if it discovers that there is anything wanting in authority the representative concerned is asked to get the requisite authority from its State. If the Full Powers are found to be adequate the representatives enter upon their task before the Conference.

(b) Ratification.—*Oppenheim* defines ratification as "the final confirmation given by the parties to an international treaty codcluded by their representatives and is commonly used to include the exchange of documents embodying that confirmation."

Fenwick defines ratification as "an executive set performed by the Head of the State announcing the formal acceptance of the treaty."

"According to the practice now prevailing a subsequent ratification is essentially necessary ; and it is not now to be presumed that the powers of plenipotentiaries are limited by the condition of subsequent ratification. The ratification may be in form, but it is an

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"The general correctness of the principle is indisputable". *Lawrence* observes that 'the declaration sounds well' ; but a little consideration will show that it is as untenable as the lax view that would allow any party to treaty to violate it on the slightest'. *Kelsen* regards it as "an open rejection of the *Clasula rebus sic stantibus*."

Criticism.—It would thus appear that the rule *rebus sic stantibus* cannot be said to be an established rule of International Law. *Starke* observes :"The *rebus sic stantibus* doctrine is one of the enigmas of International Law Its exact scope and application are uncertain, practice is inconsistent and International tribunal fight shy of committing themselves to pronouncements or decisions involving it."

Notwithstanding the fact that the rule is uncertain in scope and application it cannot be doubted that in providing a ground for a release from treaty obligations it can be justly applied to cases where it would be greatly unjust to insist on the compliance of the terms of a treaty in changed circumstances. *Oppenheim* is in favour of the rule restricts its application to cases of exceptional hardships.

Q. 94. State briefly the grounds for voidance and cancellation of treaties. (I. A. S. 1948).

A. Voidance of treaties.—As already referred to in the preceding question, a treaty may become voidable as a result of *rebus sic stantibus* doctrine. Nothing further need be said in this connection except that the resort to this clause should be made only in every exceptional circumstances. A treaty may also become void in the following circumstances.

1. When one of the contracting parties to a treaty becomes extinct and the treaty obligations under the law of international succession do not devolve upon the State succeeding to the extinct contracting party, the treaty ceases to have any legal effect. On the ground of extinction of a party, the treaties of alliances, neutrality and the like become void.

2. When the performance of obligations under the treaty subsequently becomes impossibility, the treaty becomes void. If the performance is only temporary the treaty remains suspended.

3. When the object of the treaty is realized otherwise than by fulfilment, the treaty becomes void.

4. Treaties, the obligations of which concern certain object, become void through the extinctions of the object, e. g. a treaty concluded in regard to an island becomes void when the island disappears.

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Cancellation of treaties.—A treaty may be cancelled in the following circumstances :—

1. International Law is progressive and a rule laid down by it now may not hold good fifty years hence. Now a treaty which was in accordance with Intrnational Law at the time it was made, may after sometime become inconsistent with International Law. Such subsequent inconsistency is a ground for cancelling the treaty.

2. When one party to a treaty violates the treaty, the other party may exercise its discretion to cancel it. This discretion is to be exercised within a reasonable time. If the discretion is not exercised, in due time the right must be taken to have been waived.

3. The change of the status of one of the contracting parties may *ipso facto* cancel the treaty. When one State which was a party to a treaty becomes a dependency to another and loses its sovereignty there is an end of the treaty. The cancellation of a treaty on this ground will depend on the particular facts of the change of the status.

4. A treaty may be cancelled as a result of a war.

CHAPTER XX

TREATMENT OF ALIENS

Q. 95. What do you know about the admission of aliens, their position after admission. (P. C. S. 1976).

A. The reception or admission of aliens is a matter of discretion and every State is competent to exclude aliens from its territory. This discretion depends upon the sovereignty of State over its territory. International law does not impose any duty upon States to admit them. It is the discretion of State whether to grant or refuse the request of asylum.

Position of aliens after admission.—After being admitted into territory of a State, the aliens become the subject to the law of the State in the same way as citizens are. Since the aliens are the subject to the law of admitting State. The aliens except from the receiving State will be treated as the citizen of same State and have all the constitutional privilege e. g. equal before law. Thus the alien remains under the jurisdiction of the State in which he stays and is responsible to it for all the acts which he commits on its territory. He will also be responsible for illegal acts which he commits during the period when the territory concerned is temporarily occupied by the enemy. The aliens who reside either permanently or for a long time may also be required to pay rates and taxes and be compelled to serve in the local police and local

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fire brigade for the purpose of maintaining public order and safety. But since alien does not fall under the personal supremacy of the local State, he cannot be compelled to serve in its army, navy or air force.

There should be minimum an international standard of the alien. This view was supported for example in the *Neer Claim* (1926) R. I. A. A., IV 60.

Further what are the international rights of aliens, the deprivations of which constitute a delict for which the alien's home State has a right to demand reparations ? It is with regard to the content of these rights, not their existence or the processes by which they are protected, that international customary has often erupted. It is agreed that each State may determine for itself whether or not to admit aliens into territory and that once admitted, aliens must obey local laws. It is also agreed that certain rights and privileges that are possessed by nationals, such as, the franchise, may be denied to aliens. But international law requires that in matters of fundamental importance to the individual, such as the right to life and personal liberty—a State must treat aliens at least as well as it treates its own nationals. If a State imprisons its national only after a jury trial, for example it must accord aliens the same rights.

Q. 96. When the aliens will be expelled from receiving or admitting State ?

A. State can expel aliens as and when it desires. This is an incident of State territorial sovereignty. But this right must not be abused by proceeding in an arbitrary manner. "The power to expel and the manner of expulsion are however two distinct matters. Explusion must be effected in a reasonable manner and without unnecessary injury to the alien effected. Detention prior to expulsion should be avoided unless the alien concerned refuse to leave the State or is likely to evade the authorities." An alien should not be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality or political views. Nor should be exposed to unnecessary indignity. Further, it cannot be denied that especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State and asking for reasons for the expulsion. Moreover expulsion must always be issued on 'Just Cause'. The law relating to prosecution of aliens from expulsion finally culminated in the International Covenant on Civil and Political Rights 1966. Article 13 of the Covenant provides—"An alien lawfully in the

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territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision of national security otherwise require be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or person or persons especially designated by the competent authority."

Mass expulsion of aliens.—International law does not prohibit the mass explusion of aliens, although this resorted to usually by way of reprisals. It may, however, be treated as an unfriendly act and certainly would represent a breach of human rights. Article 1 of the European Convention on Human Rights provides, "The high contracting parties shall secure to every one within their jurisdiction the rights and freedoms defined in Section 1 of this convention. According Fenwick marks the great departure taken by the convention from traditional form of international protection of individuals, for it dispenses with nationality as a condition of protection. The most important provision for the purpose of present discussion is enshrined in Article 22 (9) which says, "the collective expulsion of aliens is prohibited."

CHAPTER XXI

THE LEAGUE OF NATIONS AND THE U. N. O.

Q. 97. What were the defects of the League of Nations ? What were the causes leading to its failure ?

A. Defects of the League.—The establishment of League marked an important event in the history of International Law and although it was declared by its members to be perfect in every respect to serve the purpose for which it was designed. But it suffered from following real defects :—

1. The Covenant permitted withdrawal from membership after notice. It also provided that a State which recorded its dissent on the question of amendment of the Covenant was liable to forfiet its membership. These provisions gave a wide latitude to the States to break off from the League and greatly contributed to its weakness. It is a matter of history that the League which at one time consisted of 62 members had only 49 members at the close of 1938. After the outbreak of the Second World War it had only 32 members including only one great power, the Great Britain.

2. The Council was ill-fitted to discharge its function of bringing about pacific settlement of international disputes. The dominant position enjoyed by the Great Powers in the Council prevented the Council from acting impartially in disputes between a small and one of the Great powers. The covenant did not provide for an independent body to discharge this function.

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3. The covenant did not make it compulsory for States to go before the Permanent Court of International Justice in case of failure of amicable settlement.

4. The covenant lacked a provision requiring States to submit the matter of revision of treaties to the Permanent Court for its advice as to whether the treaty had become inapplicable owing to change of circumstances and was likely to be a danger to peace.

5. There were no provisions to deal effectively with aggression by a great power and to protect the weak victim.

6. Last but not the least one of the main defects of the League of Nations was that it failed and failed miserably, to perform its main and primary functions of establishing peace in the world.

Causes of its failure.—The Great powers who brought the League into existence to a very great extent responsible for its failure. Having agreed in a momentary zeal for world peace to shoulder a heavy responsibility, they acted in a determined manner to evade their obligations under the covenant. "The League being but a method of concerted action could not act against aggressions when its leading actors were determined first to evade their own obligations and second to use the League as a vehicle for appearing the aggressors. The League perished because its members failed to use it to compel the orderly settlement of disputes and to prevent lawless aggression" [*F. L. Schuman* on International Politics, p. 314]. The League found itself not strong enough to bring about amicable settlement of international disputes and to prevent the Great Powers from acting in their self-interest to the detriment of weak members.

The following events illustrate the weakness of the League leading to its dissolution—

1. (a) Sometimes after the establishment of the League there began the process of withdrawal from membership on the part of small as well as big States. The process continued up to the outbreak of the Second World War when the League was left with only one Great Power, the Great Britain and about 31 smaller States. The withdrawal of States had the effect of weakening the League.

(b) In 1923 Italy bombarded and occupied the Greek Island of Corfu. Greece appealed to the League which advised a settlement favourable to Italy and failed to take a strong action against Italian aggression.

(c) In 1931 Japan occupied Central Manchuria. China made a representation to the Council. The Council asked Japan to with-

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draw its troops from Manchuria but Japan paid no heed and continued its operations. The Council again demanded withdrawal of Japanese troops but with no result, A commission was thereupon set up to enquire into the situation. China appealed to the Assembly on the Japanese attack of Shanghai. The Assembly demanded evacuation of Shanghai. Although Japan left Shanghai it kept its hold on Manchuria by declaring its protectorate over it under a treaty concluded by it with the new Government which was set up in Manchuria. In the meantime the commission made its recommendations which were adopted by the Assembly Japan feeling aggrieved left the League to enjoy the fruits of its aggression

(d) The failure of the League of Nations Disarmament Conference, frustrated the very purpose of the League. Germany repudiated the militry clauses of the Treaty of Versailles. It began to arm itself with greater vigour and the League was powerless to enforce the provisions of the covenant relating to disarmament. The Council only adopted a resolution declaring that Germany committed a breach of the treaty of Versailles, but could do no more. The result was that Germany went on increasing its military strength.

(e) The Italian aggression over Ethiopia was too strong to be opposed by the League Italy attacked Ethiopia in 1935 and the Council was called upon to apply its sanctions. On the recommendations of a commission which had been appointed the Council declared that the Italian invasion of Ethiopia was in disregard of the covenant of the League. This was approved of by the Assembly. The League applied economic sanctions against the aggressor. Italy remained undaunted and conquered Ethiopia. The Emperor of Ethiopia fled with all the forces at his command, appealed to the League. Great Britain and France not inclined to displease Italy were determined to oppose Ethiopia. The League failed to do its duty, and Ethiopia was left to her fate. Great Britain and France gave recognition to the Italian conquest of Ethiopia.

(1) The Soviet Russia attacked Finland in 1939 and the appeals of Finland to the League brought no good result. Argentina demanded expulsion of Russia. The Assembly unanimously accepted the Argentinian proposal. The Council also approved the action and Russia was expelled.

(2) The League was an association of independent States and its institution-instruments intended to make it easy for them to work together. But the Covenant did not contain even the beginnings of a system of International Government in the sense of that word. The League was hardly more than a name for describing the members collectively, it was not an organic union, and there was hardly anything that it could do in a corporate capacity. Through-

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out the Covenant it was not 'the League' but the 'members of the League' that were to act in certain ways, and everything depended upon their being ready and able to fulfil the obligations which they had undertaken. An institution constituted on these lines was to be, as a body, weak, and was bound to fail.

(3) A necessary corollary of the co-operative principle on which the League was founded was the so-called 'rule of unanimity'; in general, decision of the Assembly or the Council of the League required the agreement of all the members represented at a meeting. There were certain exceptions to this rule, especially one providing that when the Council was reporting on a dispute and making recommendations for its settlement the votes of parties to the dispute were not to be counted.

(4) From the beginning it was considered to be a Utopian plan inconsistent with the sovereignty of States. It was argued that it was a league only of the victorious belligerents of the First World War. It was enforced by President Wilson of America upon reluctant States. It was based upon spineless idealism.

(5) There was no clear line of distinction between the powers of the Assembly and the Council. Both had almost concurrent powers.

(6) The League was based not upon law but upon treaty. It was not a super-sovereign organ. Collective security is impossible without collective sovereignty.

(7) It lacked teeth, i. e., any military sanctions. Even its decision were mere recommendations.

(8) It had seven major powers as its members. One deserted it infancy, another was itself in chaos. They repudiated every principle for which the League stood, the remaining two soon grew half-hearted in their zeal for League.

(9) It was essentially a coalition of the Great Powers only. The Council consisted of nine members out of which five were permanent. It meant that only the remaining four members represented the rest of the globe in the Council.

(10) The League was a league of Government and not of peoples.

(11) There was no direct relationship between the individual and the League.

(12) The membership of the League was notifiable, and a member could be expelled from its membership. Since the League

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was intended to be all-embracing international organization, a recalcitrant member's expulsion was unjustifiable

(13) The settlement of judicial disputes of the Permanent Court of International Justice was not made compulsory in cases of non-settlement of a dispute by any other means.

(14) There was no stipulation in the Covenant of the League making it a duty of the Council to punish the violation of fundamental rules of warfare.

98. Describe briefly the constitution, functions, and powers of the United Nations Organisation. [P. C. S. 1972, 1977, 1978].

A. The organs of the organisation and their constitution and functions.—The principal organs of the organisation are (1) the General Assembly, (2) the Security Council, (3) the Economic and Social Council, (4) the Trusteeship Council, (5) The International Court of Justice and (6) the Secretariat. The Charter makes provision for the establishment of subsidiary organs which may be distinguished from specialized agencies that may be set up under inter-governmental agreements.

1. General Assembly.—According to Article 7 of the U. N.'s Charter, the General Assembly is the central organ of the United Nations. As per Article 9 of the U. N.'s Charter, if consists of all the members of the United Nations. It has its own rules of procedure including rules governing the public character of its proceedings. It elects a President and seven Vice-Presidents for each session. The Assembly discharges most of its functions through committees, which are of four kinds : Main Committees, Procedural Committees, Standing Committees and *Ad Hoc* Committees.

The General Assembly meets in regular annual sessions and in such special sessions as occasion may require. Special sessions are invoked by the Secretary-General at the request of the Security Council or of majority of the members of the United Nations.

Each member of the United Nations has one vote in the General Assembly. Each member can send up to five representatives in the General Assembly but it has only one vote. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. The important questions include recommendations with respect of International Peace and Security, the election of non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of the members of the Trusteeship Council, the admission of new member of the United Nations, the suspension of the rights and privileges of membership, the expul-

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sion of members, question relating to the trusteeship system and budgetary questions. As regards other matters, the decisions of the General Assembly are made by the majority of the members present and voting.

The functions of the General Assembly —Professor Leonard has classified the powers and functions of the General Assembly under the following headings :—

(i) Deliberative functions ;

(ii) Supervisory functions ;

(iii) Financial functions ;

(iv) Elective functions ;

(v) Constitutent functions.

1. It may discuss any question or matter within the scope of the Charter or relating to the powers and functions of any organs provided for in the present Charter and may make recommendations to the members of the United Nations or the Security Council or to both on any such question or matter. But as per Article 12 of the Charter the General Assembly will not make any recommendations on any dispute or situation with respect to which the Security Council is exercising its function unless the Security Council so requests.

2. The General Assembly may consider the general principle of co-operation in the maintenance of international peace and security including the principles governing disarmament and the regulations of armaments and may make recommendations with respect to such principles to the members or to the Security Council or both.

3. The General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by a member of the Security Council or even by a non-member and may make recommendations thereon to the State concerned or to the Security Council or both. Any such question on which action is necessary is to be referred by the General Assembly to the Security Council either before or after discussion.

4. The General Assembly may call the attention of the Security Council to situtations which are likely to endanger international peace and security.

5. The General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and funda-

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mental freedoms for all without distinction as to race, sex, language or religion.

6. The General Assembly may recommend measures for the peaceful adjustment of any situation regardless of origins, which it deems likely to impair the general welfare or friendly relation among nations including situations arising from a violation of the provisions of the Charter.

7. The General Assembly shall receive and consider annual and special respects from the Security Council containing an account of the measures decided upon or taken to maintain international peace and security, it shall also receive and consider reports from the other organs of the United Nations.

8. The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it including the approval of the trusteeship agreement for the areas designated as strategic.

9. The General Assembly shall consider and approve the budget of the organisation and shall also apportion among the members the expenses of the organisation. It shall also consider and approve any financial and budgetary arrangements with specialized agencies and shall examine administrative budgets of such specialized agencies with a view to make recommendations to the agencies concerned.

10. The General Assembly may establish such subsidiary organs as it deems necessary for the performence of its functions.

Significance of U. N. General Assembly Resolutions [P. C. S., 1977]—

It may be noted here that the General Assembly is not a world legislative body. It cannot legislate in regard to most political matters ; it can only recommend. Thus it is clear that the General Assembly has no power to make law over the States. Although the General Assembly is not a legislative body in ordinary sense of the term but its law making power have however, generally been recognised in two special contexts, (i) in respect to most of the internal operations of the U. N. and (ii) in relation to the rules of international law which govern the conduct of member-States outside the U. N. As regards the latter, the case of the admission of Israel to the U. N. may be cited. The crucial question remains as to whether a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of law making effect by virtue of its contents.

There are several ways in which a resolution, by being linked

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to one or more of the traditional sources of international law, can serve as a law creating mechanism. A resolution can interpret the U N Charter or other treaty, accelerate the development and clarify the scope of a customary rule or identify and authenticate a 'general principle' of law recognised by civilized nations. A resolution tied in this way to a traditional source of international law may reasonably be relied upon as a definite statement of international law.

Prof. Roger Fisher has pointed out four sources of pressure :—

(i) Likelihood of direct retaliation by the Government directly affected.

(ii) the possibility of an adverse reaction among aliens.

(iii) Political criticism by Government's own constituents.

(iv) The deeply rooted moral nature of individual decision makers.

It may therefore be concluded that a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of creating obligations and implications of international law. Lastly, a resolution which has fomulated general principle of law or international conduct or authoritatively interpreted the U. N Charter may fairly claim to have furthered the progressive development of international law called forth by Article 13 (1) of U. N. Charter.

2. **The Security Council.**—The various provisions of the Charter with regard to the Security Council leave no room for doubt that the Council is primarily an organ for preserving international peace and security.

The Security Council consists of fifteen members of the United Nations of whom five are permanent, and Ten are non-permanent members elected with due regard to the geographical considerations, for two years terms a retiring member not being eligible for immediate re-election. Each member has one vote. The five permanent members are the China, France, the Union of Soviet Socialist Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Matters coming before the Security Council are to be divided in two groups, *viz.* procedural matters and all other matters. In respect of the procedural matters, the decisions are to be made by the affirmative vote of any nine members. But in respect of all other matters, the decision of the Security Council shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.

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The functions of the Security Council are of executive nature a primarily in connection with the maintenance of international peace and security. It is to the Security Council that any aggrieved party to a dispute take its case for redress. It then decides what measures it should take to maintain or restore international peace or security. If a party to a dispute does not bow to its decisions it may call on its members to apply economic sanction against the refractory party and break off diplomatic relations with it. In the last resort it may sanction such drastic actioas as may involve actions by air, sea or land forces as may be necessary to restore international peace and security.

3. **The Economic and Social Council.**—This Council is subordinateto the General Assembly and act as its agent in certain functions. It consists of twenty-seven members elected by the General Assembly and nine of whom are to be elected each year for a term of three years. (Article 61). Each member shall have one representative and shall be entitled to one vote. The decisions of this Council shall be made by a majority of the members present and voting. The Council is responsible under the authority of the General Assembly for carrying out the function of the United Nations in economic, social, cultural, educational, health and related matters and for promoting the observance of human rights and fundamental freedoms. The economic and social council coordinates the works of different specialized agencies.

4. **The Trusteeship Council.**—The Trusteeship Council helps the General Assembly to supervise Trust Territories. The Council is composed of: (1) member countries administering trust territories ; (2) permanent members of the Security Council which are not administering trust territories ; (3) as manny members elected for three-years terms by the General Assembly.

Functions.—The functions and powers of the Trusteeship Council are to consider reports submitted by the administering authority ; to accept petitions and examine them in consultation with the administering authority ; to provide for periodic visits to the respective trust territories at times agreed upon with the administering authority and to take these and other actions in confirmity with the terms of the trusteeship agreements and to formulate questionnaire on the political, economic, social and educational advancement of the inhabitants of each territory.

5. **International Court of Justice** —The International Court of Justice is the principal judicial organ of the United Nations. The Court is to function in acccordance with the Statute which forms an integral part of the Charter. All the members of the United

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Nations are *ipso facto* parties to the Statute of the International Court of Justice.

The Charter imposes an obligation on the members of the United Nations which are parties to any case decided by the Court to comply with the decision of the Court in that case.

The International Court of Justice has also an advisory function to perform. The General Assembly or the Security Council may ask for advice of the Court on any legal question.

6. Secretariat —The Secretariat consists of a Secretary-General and such staff as the organisation may require. The Secretary-General who is the Chief Administrative Officer of the Organisation is to be appointed by the General Assembly on the recommendation of the Security Council. The Secretary General acts as the Chief Administrative Officer in all the meetings of the General Assembly, of the Security Council, of the Economic and Social Council and of the Trusteeship Council, and also performs such functions as are entrusted to him by these organs. He has to make an annual report on the work of the Organisation to the General Assembly. He is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security.

Q. 99. Briefly dwell upon the "purposes" and "principles" of the U. N. O. Is the veto power of the permanent members of the Security Council consistent with sovereign equality of States? (I. A. S. 1974).

A. "Purposes" and "Principles" of U. N. O.

"Purposes"—The "purposes" of the U. N. O. are stated in Article 1, of the Charter. According to Article 1, following are the object of the United Nations :-(1) To maintain peace and security : —Article 1, provides that one of the purposes of the U. N. O. is to maintain international peace and security. This purpose is so important that it led Kelsen to observe, 'The purpose of the United Nations is world peace'.

"Principle".—Article 2 of the Charter also sets out certain "principles" Two of these "principles" are laid down for organic observance by the United Nations itself, namely, that the basis of the United Nations shall be sovereign equality of all its members and that it shall not intervene except where "enforcement action" is called for in matters "essentially" within the domestic jurisdiction of any State.

The principle of sovereign equality of all members, it may be noted, has not been adhered throughout. A close study of the various

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provisions of the Charter will show that a distinction has been made between the Five Great Powers which are the permanent members of the Security Council and other members of the United Nations. The consent of the Great Powers is needed for the amendment of the Charter, for admission of new members, for decision and recommendation in connection with the settlement of disputes and safeguarding international peace and security and in many other cases. The Charter in providing for the concurrence of permanent members in the decision of all but procedural matter makes it impossible for the Security Council to take an enforcement action against the Big Five. This provision is inconsistent with the principle of equality re-affirmed in the Charter. As no permanent member, against which an enforcement action is proposed to be taken, can record its vote in favour of the action against itself, the Security Council cannot make any decision with regard to an enforcement action against a permanent member. Here lies the glaring inequality. Any one of the Big Five, the permanent members of the Security Council, can veto the proposal supported by the remaining ten members of the Security Council. Such provision stands as an affront to the democratic principle of sovereign equality of States.

Q. 100. (a) Discuss the law relating to the membership of the U.N.O. [I.A S. 1973, 1974, P.C.S. 1974].

A. (a) Membership of the U. N. O.—The membership of the United Nations consist of : (a) original members and (b) members admitted in accordance with Article 4 of the Charter.

According to Article 3 of the U.N.'s Charter, the original members are those States which having participated in the San Francisco Conference of 1945 or having signed in the United Nations Declaration on New Year's Day, 1942, sign and ratify the Charter.

As to members, other than the original members, Article 4 of the Charter provides that membership is open to "all other peace-loving States which accept the obligation, contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations", and that such admission will be effected by a decision of the General Assembly upon the recommendation of the Security Council (this in effect means by at least a two-third votes of the General Assembly on the recommendation of at least nine members of the Security Council including the five permanent members).

In its Advisory Opinion on Conditions of membership in the United Nations, (1948) I C.J., Reports, 61, the International Court of Justice by a majority held that Article 4 lays down five conditions by way of exhaustive enumeration, and not merely by way of illustrations

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namely, that any new applicant must : (a) be a State ; (b) be peace-loving ; (c) accept the obligations of the Charter ; (d) be able to carry out these obligations and (e) be willing to do so. The Court also ruled that a State member voting on the admission of a new State whether on the Security Council recommendation, or on the General Assembly decision is not entitled to make its consent to the admission of an applicant dependent on the fulfilment of conditions other than those prescribed in Article 4, and in particular is not entitled to make such consent dependent of the admission of other applicants. In the Court's view a State Member must in voting have regard only to qualifications of a candidate for admission as set out in Article 4, and not take into account extraneous political considerations.

Under the present usage and procedure (Rule 60 of the Rules of the Security Council) the Security Council practically decides in the first instance on the application of a State for admission as a new Member, and by reason of the "veto" may fail to make an effective recommendation. The International Court of Justice has, however, ruled that the General Assembly cannot by its own decision admit a new Member State, where the Security Council has failed to make any recommendation as to the membership, favourable or otherwise. The General Assembly remains, of course always free to reject a candidate recommended by the Security Council.

Articles 5 and 6 of Charter deal with the suspension or expulsion of Member States, which is effected by a decision of the General Assembly on the recommendation of the Security Council. Members may be suspended from exercising the rights and privileges of membership if preventive or enforcement action is taken against them by the Security Council or be expelled if they persistently violate the principles of the Charter.

Q. 101. What are the powers and functions of the Security Council ? Give arguments for and against the veto right of the five permanent members of the Security Council. What is relationship between Security Council and General Assembly ? (U. P. P. C. S. 1990).

A. Functions and powers of the Security Council.—The functions of the Security Council are of executive nature and are primarily in connection with the maintenance of international peace and security. Under Article 24 the members of the United Nations have, in order to ensure prompt and effective action, thrown on the Security Council primary responsibility for the maintenance of international peace and security. The act of the Security Council under the responsibility is to be done in accordance with the purpo-

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ses of the United Nations. The various functions and powers of the Security Council are :—

1. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by peaceful means.

2. The Seeurity Council may investigate any dispute or any situation which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

3. The Security Council may recommend appropriate procedure or method of adjustment with regard to a dispute.

4. The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make its recommendations or decide what measures are necessary to maintain or restore international peace and security.

5. The Security Council in order to prevent an aggravation of the situation may recommend or decide upon provisional measures and call upon the parties to comply with such provisional measures as it may deem desirable.

6. The Security Council is to decide as to what measures not involving the use of armed forces are to be taken to give effect to its decisions and may call upon the members of the United Nations to apply such measures.

7. The Security Council if it thinks that measures taken by it for the purpose of giving effect to its decisions, have proved to be inadequate may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.

8. The Security Council may call upon the members of the United Nations to make available to it armed forces, assistance and facilities including right of passage in respect of which the members have entered into agreements or special agreements with Security Council.

9. The Security Council shall make plans for the application of armed force with the assistance of the Military Staff Committee.

10. The Security Council shall encourage the development of specific settlement of local disputes through regional arrangements or by regional agencies.

11. The Security Council shall exercise all functions of the United Nations relating to the strategic areas including the approval

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of the terms of the trusteeship agreements and of their alteration or amendment.

12. The Security Council shall subject to the provisions of the trusteeship agreements and without prejudice to security considerations avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social and educational matters in the strategic areas.

13. The Security Council shall submit annual and when necessary, special reports to the General Assembly for its consideration.

14. The Security Council shall be responsible for formulating. with the assistance of the Military Staff Committee plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments.

15. The Security Council has to make recommendations to the General Assembly in the matter of admission of a State to the membership of United Nations and in the matters of suspension or expulsion of a member.

16. The Security Council is to take part in the appointment of the Secretary General and of the judges of the International Court of Justice.

The Veto of Great Powers.—The permanent members of the Security Council, the so called "Big Five", enjoy a special position in the United Nations. Article 27 of Charter lays down that the decisions of the Security Council on all but procedural matters would be made by an affirmative vote of 7 members including the concurring votes of the permanent members. This means that a permanent member, by a negative vote on any question not involving a matter of procedure, can defeat the main purpose of the Council. The result seems to be that the "Big Five" are in a position to dominate over other States and are themselves above the law. The position that emerges out from Article 27 of the Charter involves a conflict with the cherished principle of sovereign equality and has the tendency of destroying much of goodwill that forms the basis of the United Nations Organization.

The right of veto was exercised nearly fifty times during the first five years of the United Nations with the result that the Security Council failed in exercising its primary responsibility for the maintenance of international peace. It was this situation that prompted the United States to submit an item entitled 'United Action for Peace' for inclusion in the Agenda of the Fifth Session of the General Assembly. The General Assemby on November 3, 1950

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adopted three resolutions under the heading *'Uniting for Peace'*. The most important provision of these resolutions is that the General Assembly in case the Security Council fails because of the lack of unanimity of the permanent members to exercise its primary responsibility for the maintenance of the international peace, is bound to consider the matter immediately with a view to make recommendations to the members for collective measures necessary to maintain or restore international peace and security. This provision aims at nullifying the effect of the veto of the permanent members.

It is obvious that the right of veto residing in the Great Powers makes it impossible for the Security Council to function in respect of its primary responsibility of maintenance of International peace in case one of the Great Powers evades its obligations under the Charter and acts in a manner likely to disturb the peace of the world. It is maintained in some quarters that the system of collective security embodied in the Charter has no practical effect against a Great Power and that the Charter fails in its purpose to that extent. Although in view of the declaration that the people of United Nations were determined to unite their strength to maintain international peace and security it was expected that the Great Powers as well as Small Powers would co-operate in removing all threats to international peace and the Great Powers would not use their veto in their self-interest. The system of Collective Security is liable to be set at naught by the opposition of a single Great Power. Why such a provision granting the right of veto to a chosen few finds place in the Charter of the United Nations is a question which is difficult to answer. A clue to the answer of such question may be furnished by the extraordinary events of the Second World War and the peculiar situation which prompted the Great Powers to create the Organisation of the United Nations.

The justification for the right of veto of the Great Powers may be found in the fact that the danger to international peace and security has its source in the Great Powers and the Charter places very great responsibilities on them. Veto was regarded as a "defence against involuntary servitude, a complete answer to any rational fears of subordinating the destiny of Big Powers to allied commands and a guarantee of perpetuated independence of international dictation". The legitimate exercise of the right of veto can hurt nobody and there should be no misgivings on that account. But the future appears to be dismal and gloomy if the Great Powers themselves act in a manner as to disturb the international peace or to undermine the system of collective security provided for in the Charter. There can be no safeguard against such a danger in an organisation like the United Nations which is intended to

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work on a co-operative basis. It is good will of all the nations, great and small, which can alone help to maintain international peace and security.

Relation of Security Council with the General Assembly.—It would appear from the above discussion of the function and powers of these two important organs of the United Nations while the General Assembly is a deliberative body, the Security Council which is specifically charged with maintenance of international peace and security is an executive organ. The very nature of the primary function of preserving peace and security makes the Security Council a more important political organ than the Assembly. Although the Security Council has to submit reports of its activities to the General Assembly it is supreme within the sphere of its powers for there is nothing in the Charter which authorise the General Assembly to override the decisions taken by the Security Council. The main activities of the Security Council and General Assembly are entirely different. But there are many matters in which both these organs are required to co-operate in fulfilment of the object of the Organisation.

Q. 102. What are the sanctions applicable by the Security Council to an aggressor State ? Compare them with the sanction, if any, provided under the League of Nations. (I. A. S. 1954, 1960, P. C. S. 1969.)

A. Enforcement action by Security Council.—Articles 39, 50 (Chapter VII) of the United Nation's Charter enumerate specifically enforcement actions which the United Nations is empowered to take for a prompt and effective action. The Security Council is vested with the power of determining the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations or decide what enforcement measures are to be taken to maintain or restore peace and security (Article 39). It may call on the parties involved to comply with provisional measures, and take account of any failure to comply therewith (Article 40).

The Charter prescribes two kinds of enforcement actions which can be decided by the Security Council.

1. Measures not involving the use of armed force.—The Security Council may call upon the Member-States to apply complete or partial interruption of economic relations, and of all means of communication, and to sever diplomatic relations (Article 41).

2. Action by air, sea or land forces where the measures under (1) are inadequate.—Such actions may include demonstrations,

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blockade, and other operations by air, sea or land forces of the United Nations (Article 42).

The Security Council may decide whether the action necessary to carry out its enforcement decisions is to be taken by all or some Member-States only, and to mitigate any possible hardship, Member-States are to co-operate mutually in carrying out the Security Council decisions (Articles 48, 49). Also if any member or non-member is faced with the special economic problems arising from carrying out the preventive or enforcement actions decided upon, it has the right to consult the Council on those problems (Article 51).

Article 47 provides for a Military Staff Committe composed of the Chiefs of Staff of the five permanent members, to advise and assist the Security Council on the military aspects of enforcement action. In addition, Article 43 provides for agreements between the Security Council and Member States as to the forces and other assistance they can make available for enforcement action.

In order to enable the United Nations to take urgent military measures, members, shall hold immediately available national air-force contingents for combined international enforcement action (Article 45).

Enforcement action in League Covenant.—Articles XII—XV of the Covenant lays down in detail the procedure for peaceful settlement of disputes. The covenant also provides safeguards against any attempt of the Council to sacrifice the just and legitimate claims of a weak power to political expediency.

Article XVI of the Covenant enumerates those circumstances in which sanctions are to become applicable. The economic and military enforcement actions provided in Article 11, paragraphs 1 and 2 of the League Covenant were in the nature of sanctions. These were, as pointed out by Kelsen, expressly directed against a specific violation of the Covenant. Paragraph 1 of Article 16 dealing with the enforcement measures not involving the use of armed forces lays down that if any member of the League resorted to war in disregard of its Covenant under Articles 12, 13 or 15 it shall *ipso facto* be deemed to have committed an act of war against all other members of the League who immediately sever all trade or financial relations and prohibit all intercourse between their nationals and the nationals of the recalcitrant State. Article 16, paragraph 2 which deals with enforcement action involving the use of armed force states that it shall be the duty of the Council, in case a member resorts to war in utter disregard of its obligation under the Covenant, to recommend to the several Governments concerned what effective military, naval or air force assistance

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of the Members of the League shall severally contribute to the armed forces to be used to protect the Covenant of the League.

The most glaring weakness of the Covenant plan of security was that though the Covenant stated that the sanctions will become applicable in case a Member State resorts to war disregarding its covenants, it allowed the Member State to decide for itself whether in any particular case the event justifying the application of sanction has occurred and therefore whether the obligation is to be discharged.

Chapter VII of the Charter, however, does not define the event justifying enforcement measures to be taken by the United Nations. It is for the Security Council to determine that a threat to the peace or a breach of it, exists, or that an act of aggression has been committed. It will then make recommendation or decide on behalf of the whole organisation, what enforcement measures are to be taken to maintain or restore peace and security. The Charter thus deprives Member States of the right to determine and to apply enforcement measures individually and transfer this right to the Security Council. It is thus fairly, obvious that the Charter so far as the enforcement measures are concerned, is a distinct improvement on the League Covenant. Though it cannot be said that the United Nations has achieved hundred percent success in maintaining peace and security in the world, it has through the Security Council achieved notable success in either localising a conflict or preventing escalation of war and in some cases settling disputes which threatened peace.

Q. 103. What is "double veto" ? What is the legal basis of limitations to the 'Double Veto' in the Security Council ? How far has the Security Council helped the development of International Law ?

A. Double Veto.—The Permanent members of the Security Council, the so-called 'Big Five', occupy a special position in the United Nations. Article 27 of the Charter lays down that decision of the Security Council on all but procedural matters would be made by an affirmative vote of nine members including the concurring votes of the five permanent members. This means that a permanent member by a negative vote on any question not involving a matter of procedure can defeat the main purpose of the Council. The Charter, however, makes no clear-cut demarcation between procedural and non-procedural matters. In Security Council also there is no established procedure to resolve any controversy as to whether a particular matter is procedural or substantive. The question came before the Great Powers at the San Francisco Conference. Their answer is contained in the Statement by the Delega-

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tion of the Four Sponsoring Governments on voting Procedure in the Security Council. The Declaration states that : "It will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply. Should however such a matter arise, the decision regarding the preliminary question as to whether or not such a matter is procedural, must be taken by a vote of nine members of the Security Council, including the concurring votes of the Permanent Members." By virtue of this Declaration a permanent member can veto the actual decision whether a question to be put to what, vote is, one of procedure or of substance, giving rise to what is known as the "double voto."

Thus a permanent member can use his veto two times and this is generally known as double veto ; Russia used double veto of the question of Greace, Czechoslovakia and Spain.

Legal basis of limitations to Double Veto.—The so-called 'double veto' derives its primary and ultimale authority from the Charter itself. *Mr. Ednasdo Timenez De Are Chega* in his book 'Voting and the handling of disputes in the Security Council' observes that the powers granted by the San Francisco statement can only be exercised with the qualifications and conditions which derived from the Charter or from this very document. These limitations are ;

(a) Occassion.—The preliminary vote, which was assumed to be rare occurrence, can only be applied when there is a reasonable doubt of the nature of the question ;

(b) Method.—Before recourse to such a veto all efforts should be made to analyse the Charter in order to mark explict the answer which the *San Francisco* statement says is therein contained for most questions, especially those of great importance,

(c) Content.—By the preliminary veto it is impossible to classify as non-procedural and procedural matters under the Charter of the *San Francisco* statement.

Development of International Law by Security Council —In words of *Starke*, "The Security Council has yet to exercise the full range of its powers in relation to preventive or enforcement action. In the earlier cases which came under its jurisdiction involving actual hositilities, its efforts were concentrated on securing truce or ceasefire as it did in 1948 in the case of the hostilities in Palestine. Even in the case of the Korean Conflict (1950-53), although it recommended peace enforcement action which was taken by means of the forces of Member States under United States command the Security Council stopped for short of exercising the plentitude of its authority."

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Proceeding further he says that "in certain instance the provisions of the Charter have been applied by the Security Council in a flexible manner. For example, by common consent the President of the Council has taken a major responsibility for guiding the peaceful settlement of disputes, acting informally on the Council's behalf as conciliator between the disputed parties."

The Councils played vital role in the solution of various international disputes such as the Indonesian question, the Indo-Pakistan dispute over Kashmir, the Palestine question and the Korean question, and restored law and order in Congo, making thereby valuable contributions in the development of International Law.

Arab-Israeli Conflict, 1973.—The Security Council played a significant role in resolving the Arab-Israeli Conflict. An armed conflict on a large scale took place between Arab countries and Israel in the first week of October, 1973. On 22nd October, 1973 the Security Council passed a resolution jointly submitted by America and Soviet Union. The resolution contained the following three main points :—

(i) All military actions be stopped by all the parties concerned within 12 hours of the passing of resolution.

(ii) Security Council's resolution 242 be fully implemented by all parties concerned immediately after the cease-fire.

(iii) After the cease-fire, the parties concerned should hold talks for the establishment of just and stable peace.

Egypt and Israel accepted the resolution and ended the armed conflict ; later on Syria also accepted the resolution.

Q. 104. The Charter of the United Nations indicates numerous provisions, the wide possibilities of the international recognition of human rights (Oppenheim). Discuss. (I. A. S. 1950 ; C. S. E. 1979, 1989.)

A. Main Provisions of the Charter of United Nations.—The drafting of the Charter of United Nations is landmark in the history of mankind. Its relevant provisions signify the importance of the Charter in the international sphere. The preamble of the Charter expresses the ends in view, the means whereby those ends are to be achieved and, lastly, the determination or resolution to combine efforts to accomplish the aims. The aims in view are : (1) to save succeeding generations from the scourge of war, (2) reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, (3) to establish conditions under which justice and respect for obligations arising from treaties or other

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sources of International Law can be maintained and (4) to promote social progress and better standard of life in larger freedom. The means chalked out by the Charter for the achievement of the aforesaid aims are : (i) to practise toleration and to live together in peace with one another as good neighbours ; (ii) to unite strength to maintain international peace and security : (iii) to ensure that armed force shall not be used to save in common interest : (iv) to comply international machinery for the promotion of the economic and social advancement of all peoples.

The Principle of self-determination.—The principle of self-determination is incorporated in Article 1 [(2)] 55 and 56 of U. N. Charter. Article 56 deals with the promotions of International Economic and social co-operations—with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal right and self determination of people. But there is however, a great controversy as to whether the principle of self-determination has become a binding principle of International law. In this connection several contentions are being given by the jurists that it was incorporated in chapter because it had already become a principle of international law. However, the legal value of self-determination under these articles considerably diminished by three major limitations :

(i) There is lack of an adequate measure of the definition of self-determination in U. N. Charter.

(ii) The principle in Article 1 (2) is only subservient to certain purposes of U. N. (such as to maintain International peace and security to develop friendly relations among nations and to be a centre for harmonizing the actions of nations.)

(iii) Article 2 (7) of U. N. Charter which prevents interventions in matters essentially within the domestic affairs of a State is also a great limitation for the issue of self-determination can arise within an existing State.

Article 1 (3) of the Charter lays down that one of the purposes of the United Nations is to achieve international cooperation in solving international problems of an economic, social or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

By Article 13 of the Charter, the General Assembly is enjoined to initiate studies and make recommendations for purposes of ;

(a) promoting international co-operation in the political field

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and encouraging the progressive development of International Law and its codification ;

(b) Promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 55 lays down that, with a view to the creation of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples. The United Nations shall promote—

(i) higher standards of living, employment and conditions of economic and social progress and development ;

(ii) solutions of international economic, social, health and related problems ; and international and educational co-operation, and

(iii) universal respect for and observance of human rights and fundamental freedom for all without distinction as to race, sex, language or religion.

Under Article 62 (2), the Economic and Social Council may make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all. Article 68 empowers the Council to set up Commission in economic and social field and for the promotion of human rights. Finally, mention may also be made of the trusteeship system established by the United Nations. The basic objectives of the trusteeship system are :—

(a) to further international peace and security ;

(b) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-Government or Independence as may be appropriate to the particular circumstances of each territory and its people and the freely expressed wishes of the peoples concerned and as may be provided by the terms of each trusteeship agreement ;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion and to encourage recognition of the inter-dependence of the peoples of the world ; and

(d) to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals and also equal treatment for the latter in the administration of justice. [Please refer partly the answer to question 129].

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Although there is no provision in the charter for the enforcement of the fundamental human rights, it cannot be denied that the Charter imposes a legal duty on the members of the United Nations to respect these fundamental human rights. "It cannot be said that these provisions, signify a full and effective guarantee of the inalienable rights of man on the part of the international society. One of the principal tasks of which would be the drafting of an International Bill of the right of man goes to show that there is still room for further developments in the directions of the recognition of human rights. [*Oppenheim*—International Law, Vol. 1, (Seventh Ed). p. 670].

Q. 105. "Collective security is the main purpose of the United Nations". (Kelsen) What are the provisions in the Charter towards that end ? Do they mark any improvement upon those provided in the Covenant of the League of Nations ? Give reasons for your answers. (1976 P.C.S.)

A. Collective Security under the U.N. Charter.—One of the purposes of the United Nations as laid down in Article 1, paragraph 1 is "to maintain international peace and security and to that end to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and International Law, adjustment or settlement of international disputes or situation which might lead to breach of the peace". The members of the United Nations are not permitted to have recourse to any use of force which does not bear the character of a collective measure. Article 2, paragraph 4 imposes the duty on the members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent, with the purposes of the United Nations. Article 2, paragraph 5 declares that it is the duty of all the members to give every assistance to the United Nations in taking preventive or enforcement action.

The Charter also contains a scheme for the Pacific settlement of disputes in Chapter IV. It is provided therein that the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security are bound, in the first instance, to seek a solution, by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. It may, however, be noted that while the covenant required the members to submit their disputes to arbitration, judicial settlement, or, to the Council the Charter makes it obligatory on the members to resort to the various methods of peaceful settlement of inter-

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national disputes. The dispute referable to the Council or to arbitration of judicial settlement under the Covenant was one which was likely to lead to a rupture. In the Charter the dispute in which the parties are required to resort to peaceful methods of settlement is one, the continuance of which is likely to endanger maintenance of international peace and security. Again those disputes which are likely to endanger maintenance of international peace and security are to be submitted to the Security Council. The Security Council is to decide whether the dispute is one, the continuance of which is in fact likely to endanger the international peace and security. If all the parties to a dispute go to the Security Council with their dispute, the Security Council has the power to make recommendations to the parties with a view to a pacific settlement of that dispute.

Apart from it, the Security Council when it deems necessary shall call parties to settle disputes by peaceful methods. If this method fails, the Security Council has to take enforcement action under Chapter VII of the Charter. The Security Council is also empowered to break economic relations, and the diplomatic relations. If these methods also fail, it may take such action by air, sea and land forces as may be necessary to maintain or restore international peace.

Collective Security under the League and the United Nations.— According to *Hans Kelsen*, the following points of difference exist between the Collective Security established by the League of Nations and that established by the United Nations Charter.—

1. Whereas, under the Covenant each member of the League of Nations was competent to decide a question whether in a particular case the condition of an enforcement action exists, under the U.N. Charter the Security Council and according to the "Uniting for Peace" resolution of the General Assembly, the latter body too are competent to decide the question.

2. An enforcement action may be taken under the Charter, by the decisions of the Security Council which are binding upon the members. According to the "Uniting for Peace" resolution of the General Assembly the General Assembly, can also make recommendation to members to resort to enforcement action. The Covenant, on the other hand, provided that each member of the League was obliged to take enforcement action not involving the use of armed force (economic sanction) and was also entitled to take enforcement action involving the use of armed force, The League Council could make recommendation only in case of an enforcement action involving the use of armed force.

3. The system of Collective Security is centralized under the

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Charter under which the United Nations Organisation is to have its own armed force under its command. In the League Covenant, however, there was no such provision with the result that the enforcement action under the Covenant was completely decentralised.

4. Under the Covenant, enforcement actions could be taken in the shape of economic and military measures, called sanctions. These sanctions could be applied against a member resorting to an illegal war in violation of the Covenant.

Under Chapter VII of the United Nations Charter, enforcement action may be taken by the Security Council in the event of a threat to or breach of peace, not only against a member of the United Nations but against any State (Article 39). Security Council is to determine whether the conduct of a State in a given situation leads to a threat or breach of peace. The Security Council under Article 39 may make its recommendations or decide what measures are necessary to maintain or restore international peace and security.

5. According to Article 27 of the Charter, an enforcement action requires a majority of seven members including the concurring votes of the five permanent members. It follows from this that no enforcement action can be taken under Article 39 against a permanent member of the Security Council or against any State backed by a permanent member. As the League Covenant was completely decentralized in this respect the enforcement action was saved of the difficulty caused by such a right.

It is thus clear that the provisions of Collective Security in the U.N. Charter are far ahead of those of the League Covenant.

Q. 106. Discuss briefly in what respects the United Nations Organization is different from League (P. C. S. 1955).

A. U. N. O. and the League of Nations.—The dissolution of the League of Nations should not obscure the fact that the United Nations Charter owes much to the League experience, and its provisions drew heavily on the League's traditions, practice and machinery. Yet, although the U. N. O. is successor to the League and in many ways patterned on it there ars basic differences between the two institutions. Which are noted below :—

(1) The preamble of the Charter of the United Nations is significant and materially differs from that of the League. The League was resolved upon by the High Contracting Parties, that is to say, the Governments of the participating States while the Charter represents the determination of the peoples of the United Nations and is democratic in nature. The peoples of the United Nations

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have shouldered the responsibility of preventing the recurrence of the war.

(2) The League Covenant in Articles 12, 13 and 15 carefully specified the obligations of the member States while the Charter sets forth obligation of the members of the United Nations in general terms in Article 2.

(3) The League had apart from its Secretariat two principal organs only, *viz.*, the Assembly and the Council and both of these organs could deal matters within the sphere of action of the League and affecting the peace of the world. The United Nations has, besides the Secretariat, five principal organs, *viz.*, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, and the International Court of Justice. The functions and the powers of all these organs are well defined in the Charter. The functions of the Assembly and the Council under the League Covenant were not clearly specified.

(4) The fact that the Charter of the United Nations provides for an Economic and Social Council as one of the principal organs of the Organisation shows that the United Nations pays greater attention to the International-economic, social, cultural, educational and health problems than the League.

(5) The League Covenant made a provision for the withdrawal of a member after two year's notice of its intention to do so. The Charter of the United Nations does not expressly provide for withdrawal of the members of the United Nations.

(6) The Charter of the United Nations provides for more effective methods for the prevention of war or threat of war. The Security Council has to determine whether the situation constitutes a threat to peace and if so what methods must be taken to maintain the peace. The Security Council may call upon the parties to comply with provisional measures proposed by it. In case, there is non compliance with the provisional measures the Security Council will decide upon measures, not involving the use of armed forces ; but if these measures also prove inadequate the Security Council will then take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. The provision for a Military Staff Committee in the Charter to advise and assist the Security Council on all questions relating to the armed forces placed at the disposal of the Council is another important feature of the Organisation.

(7) The question, whether or not a situation calling for an enforcement action has arisen is to be decided under the Charter by the Security Council and also by the General Assembly in pursuance

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of 'Uniting for Peace' resolution adopted on November 3, 1950. The question had to be decided by each member of the League in the Covenant. Under Article of the Covenant a party to dispute likely to lead to rupture and not submitted for peaceful settlement was required to give notice of the existence of such a dispute to the Secretary General who was to make proper arrangement for investigation and consideration.

(8) (i) The enforcement action under the Charter is required to be taken on the decision of the Security Council which was binding on the members. The General Assembly is also entitled under the Uniting for Peace Resolution to recommend the enforcement measures to the members. The Covenant provided for the taking of enforcement action not involving the use of armed forces by the members. The Council under the Covenant could only make recommendations with regard to enforcement action involving use of armed forces.

(ii) The Charter provides for the maintenance of armed forces at the disposal of the United Nations for the purpose of taking an effective enforcement action to restore international peace and security. The Covenant of League provided for no such thing.

(9) The Charter differs from the Covenant in the helplessness of the Security Council to take an enforcement action against a Permanent Member of the United Nations Organisation because the decision of the Security Council on all but procedural matters has to be made by an affirmative vote of nine Members. The Covenant provided no such rule and the Original Members of the League had no such right of voting.

(10) The Covenant provided that a treaty or international engagement entered into by any Member of the League but not registered with the Secretariat would not be binding. The Charter in Article 102 provides that no party to any treaty or international engagement which has not been registered with the Secretariat is permitted to invoke that treaty or international engagement before any organ of the United Nations.

(11) The Procedure laid down in the Charter for the adoption of amendments differs from that of the League Covenant. The Covenant required an unanimous resolution in respect of an amendment. The Charter provides for the adoption of an amendment by the vote of two-thirds of the members of the General Assembly which may not necessarily include the votes of the members of Security Council. The Covenant provided for the rule that the amendment did not bind the dissenting member State and that the dissenting State ceased to be Member of the League. The Charter

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does not provide expressly for a dissent or consequent cessation of membership.

(12) The League Covenant guaranteed the territorial integrity and political independence of the Member States. The Charter instead of providing for any such guarantee places an obligation on the members to refrain from threat or use of force against territorial integrity or political independence of any State.

(13) Uuder the Charter, decisions are made by majority votes, although the Security Council decisions, except on procedural matters, must have the concurrence of the five Great Powers, who are permanent members. In the League, all decisions of importance, required unanimity.

(14) The Power of Assembly and the Council of League of Nations were not clearly demarcated, while the Power of General Assembly and the Security Council of U. N. have been demarcated.

(15) In the League of Nations, great Powers did not possess Veto powers but the Charter of U. N. has conferred upon the permanent members of the Security Council the Power of Veto.

(16) There was no provision in regard to self-defence in the covenant of League of Nations. On the other hand the Charter under Article 51, confers on States the right of individual or Collective defence.

(17) The League of Nations did not prohibit war. It simply put certain restrictions upon members States to resort war. But the Charter of U. N. prohibits war. However, it permits resort of war in self-defence.

(18) The League of Nations aimed to restrict the right to go to the war. It did not prohibit use of force. The Charter of U. N. prohibits use of force in international relations.

It is clear from the above discussion that the United Nations is much more effective, powerful and successful organisation than league of Nations. It has attained universality. Despite its weakness and failures in the field of peace and security, it has performed commendable functions in the social, economic, cultural, educational and humanitarian fields. It has become an organisation of inescapable importance.

Q. 107. If you are asked to redraft the Charter of the United Nations what principal changes, if any, would you introduce ?

Or

Can the U. N. Charter be amended or revised ?

IL 17

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A. Suggested changes in the U. N. Charter.—Any Organisation dealing with groups of human beings, like the U. N O can hardly be expected to be a static one. It has to adjust itself according to the character and behaviour of those human beings. Therefore, it should surprise no one if the U. N. O needs some change. Possibility of changes was visualized even at the beginning and that was the reason why Article 109 was incorporated in the Charter. Even at the foundation Conference at Sen Francisco some changes were foreseen when the great majority of the smaller States opposed the extraordinary privileges given to the Big five.

(1) Membership—Article 4 of the Charter lays down that membership is open to all other 'peace loving States' which accept the obligations of the Charter and which are in the judgment of the Organisation able and willing to carry out obligations. However, the exclusion of some of States does not give the U. N. O. that inclusiveness that it should have to create the psychological atmosphere necessary for the furtherance of world peace. To achieve the purpose, the United Nations has long been suggesting the elimination of 'veto' on the question of membership. Since this can hardly be expected to win approval of the Soviet Union, a way might be found by spelling out more precisely the qualifications of membership and establishing definite tests by which the qualification could be judged on a more objective basis. Something in the line was attempted when the General Assembly in a resolution in February 1952, expressed that the determination of the qualification of applicant States should be based on facts such as the maintenance of friendly relations with other States, the fulfilment of international obligations and the record of a State's willingness and present disposition to submit international claims or controversies to pacific means of settlement established by International Law.

(2) Domestic Jurisdiction.—Article 2 (7) of the U. N. Charter debars it from intervening in matters which are "essentially" within the domestic jurisdiction of the State. Under cover of this provision, the Union of South Africa has consistantly refused to allow the United Nations to discuss the inhuman treatment meted out to the Indian citizens there. In one of the sessions of General Assembly, France also refused to discuss the question of the self-determination of the people of Algeria. Naturally the provision has been looked upon as a measure to safeguard the interest of the Colonial Powers. It is therefore absolutely necessary that such matters only should be deemed as domestic as are declared to be so according to International Law. The word "essentially" in Article 2 (7) should be replaced by "according to International Law."

(3) Security Council and the Veto.—Nothing has raised so much of controversy and omitted too much of heat as the 'veto'

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power of the permanent members of the Security Council. No doubt the provision was inserted because of the inescapable conclusion that international peace and security could be enforced or maintained if only the Great Powers assured their sanction behind it. "It was simply the constitutional expression of an inescapable fact of power." Therefore in spite of the great many abuses of 'veto', its complete elimination would inevitably lead to the break down of the collective security system of the United Nations. But need has been felt for the restriction of its use in some ways. Under the existing rule even the Pacific settlement of dispute, that is the Security Council's power to recommend ways and means to settle disputes peacefully comes under the 'veto' power. Therefore, solution of any dispute before the actual breaking out of hostility, which calls for enforcement action, becomes impossible in case the solution does not suit the interest of one or the other permanent member. Hence conciliation or specific settlement of disputes should be kept out of the 'veto' jurisdiction and the rule of unanimity should be substituted by a simple majority of seven members including not more than three permanent members. Some of the force of the 'veto' has already been taken away by the 'Uniting for Peace Resolution' passed by the General Assembly in 1950. Under that resolution, the General Assembly established machinery by which it could recommend collective measures to maintain international peace and security if the Security Council were blocked by *veto*. In view of this significant development, there should not be much opposition to the permanent members agreeing to curb its use.

(4) Regionalism and security.—The U. N. Charter permits formation of regional arrangements to strengthen the system of collective securiy under Article 52, 53 and 54 (Chapter VIII). The sole responsibility for peace and security however, remains with the Security Council. Hence, enforcement action taken by them must have prior sanction of the Security Council. But the provision of the Charter leaves wide scope for discretionary use. Nothing has been said as to whether non-regional States could become members of the regional Organisations. In fact most of the regional organisations like NATO and SEATO are composed of non-regional powers. The way these regional arrangements have been turned into predominantly military alliances, also leave no shade of doubt that instead of promoting world security they have everywhere made situation explosive. Article 52 (1) permits regional agencies to deal with "such matters relating to the maintenance of peace and security as are appropriate for regional action". The question then arises as to who is competent to decide the appropriateness for 'regional action'. *Kelson* opines, the members concerned might have the power of deciding the question because the U.N. Charter does not authorise any particular

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organ to decide the appropriateness of regional actions. This obviously is a serious lacuna.

(5) Trusteeship system.—Encouragement of fundamental freedoms which include the right of every human being to share in the political independence of the country was accepted as one of the objects of the trusteeship system. But there are certain loopholes in the system. It makes a needless distinction between ordinary trust territories and those regarded as strategic with the control of the former belonging to the General Assembly and the latter to the Security Council. By doing so, much room was left to make use of a strategic trust area in the game of cold war politics. This distinction must be removed and all trust areas should be placed under the general supervision of the General Assembly. The Security Council should have no say in the matter.

Another lacuna in the system is the discretion left to the former mandatory powers to enter in the system or not. It is the misuse of this discretion that the Union of South Africa has kept the South West Africa out of the Trusteeship system despite General Assembly's repeated recommendations. A way be found by amending Article 77 to make it read that all Trust territories formerly under mandate become *ipso facto* members of the Trusteeship system.

(6) International Court of Justice.—All questions involving interpretation should be dealt with by the International Court of Justice whose jurisdiction should be made as comprehensive as possible. In view of the conflicting interests of the Power Blocks, it is difficult to assume that any particular executive act of the U. N. would be completely free from prejudice and bias. Hence judicial review of the executive acts especially of the more important ones like admission of new members of declaring a State as aggressor is necessary.

The scope of compulsory jurisdiction of the Court should be suitably widened. The Court should be empowered to hear appeals from decisions of the municipal Prize Courts so long as an international prize court is not set up. The Court should be enabled to exercise criminal jurisdiction over individual accuseds of crimes against International Law.

(7) Composition of Security Council.—The permanent seats should be abolished and it should be more representative. Adequate representation should be given to African and Asian countries.

(8) The Office of the Secretary-General.—The office of Secretary General of U. N. O. carries with it enormous powers

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which it is not safe to entrust to whims of one single individual. It would be better if the office of Secretary-General is vested in a committee consisting at least three individuals each representing the Western Powers, the Russian Block, and the non-committed nations.

(9) Vagueness has been pointed out by critics in certain provisions of the Charter and the same should be removed. Patanjali Sastri, ex-Chief Justice of India, observes, "After one reads the whole Charter even casually, one is left rather with a vague impression that there is a body that by reason of certain votes being exercised in one way rather than another, might hurt national interests, viewed solely from the particular national groups. Therefore, I was going to suggest a clear declaration of the powers which the member nations are willing to grant to the United Nations."

(10) A panel of 25 international experts has recommended in 1976 drastic changes to enable the U. N. to deal with world economic and social problems in a more effective and comprehensive manner. It proposed revamping of the existing decision making procedures in order to avoid confrontations between the developing and the developed countries on economic issues. It also recommended the establishment of the small negotiating groups to deal with deadlock key issues. This group would include representatives of the countries most deeply involved and would be headed by prominent individuals who would devote full time to promote agreements. It also proposed that the present voting system in the World Bank and I. M. F should be revised to provide greater powers for the developing countries.

Q. 108. Evaluate the work done by the U. N. O. Has it been successful in maintaining peace and security of the world? Fortify your answer with concrete examples.

A. Work of the U.N.O.—Uptill now the U.N.O. has done a lot of work. Its work can be studied in two groups i.e., (a) economic and allied fields, and (b) preservation of peace and security.

A—Economic and allied matters.—The United Nations has done an admirable work in economic, social, educational and to health fields. It helps to solve economic problems of the world by means of detailed studies and surveys of the various problems. Its Secretariat has prepared many economic reports, viz., a report on the salient features of the world economic situation from 1945 to 1947, a survey of economic prospects of the Europe, and an economic survey of Asia and the Far East in 1947. It has also issued many authoritative publications on fiscal, statistical and

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population matters. It has established an Economic Commission for Europe, and Economic Commission for Asia and the Far East. The Commissions have studied in detail the economic problems of their respective regions and made appropriate recommendations. A Bureau of Food Control has also been set. The International Bank of Reconstruction and the International Monetary Fund are doing very useful work in their respective spheres.

In the social field, the United Nations gives advice and aid of qualified consultants, provides fellowship for study abroad to experts, gives equipment and supplies for prospective devices to be used for the rehabilitation of the disabled, provides technical aid through films and publications and arranges regional matters. The I. L O. has done a lot of useful work in the matter of the improvement of labour conditions in the world. The abolition of narcotic drugs and prostitution is being planned. The U. N E. S C. O is promoting world brotherhood and mutual understanding. The United Nations has already accepted the Universal Declaration of Human Rights. Efforts are also being made to promote the freedom of information. The International Court of Justice has given important decisions on many disputes. The International Law Commission has done a good work in the matter of codification of International Law.

As a result of the labours of devoted international civil servants in their respective spheres of action, technical assistance is being given to develop the less industrialized countries and loans are being given by the International Bank to build factories, develop communications and construct plants. Health standards are being raised by the World Health Organization. The output of food and its standards are being increased by the Food and Agricultural Organization. Refugees are being cared for and children are being given proper attention. Similar benefits are being enjoyed by ordinary people in many countries.

B—Preservation of Peace and Security.—The U. N. O. has done a fairly good amount of work in the direction of preservation of peace and security of the world. This aspect of the U N. O,'s work can better be appreciated in the light of the problems and situations it had to tackle.

(1) Indonesian Question.—The question first came before the Security Council in January, 1946 on the Ukranian charge against the British and Japanese action in Indonesia. The Ukranian proposal for investigation was rejected.

In July 1947, Australia and India brought to the notice of the Security Council the fighting between the Netherlands and the Indonesian Republic. The Security Council directed the parties

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concerned to stop hostilities and later issued cease fire orders. The Security Council also offered its good offices to settle the dispute and a Good Offices Committee for that purpose. As a result of the negotiations conducted by that Committee, a truce agreement was made in January, 1948, between the two governments. When in December, 1948, the Netherlands broke the truce and restarted the war, the Security Council again asked the parties to stop hostilities. In January, 1949, the Security Council asked the parties to stop hostilities and also recommended the formation of a federal, independent and sovereign republic of Indonesia. The Good Offices Committee was converted into a Commission of the United Nations charged with the work of implementing the resolution of the Security Council. On the request of the Government of Netherlands, the Security Council asked the Commission to make arrangement for a Round Table Conference for the transfer of sovereignty of Indonesia from the Dutch hands to Indonesians. The Commission was instrumental in bringing the hostilities to a close and restoring peace. The round table Conference met at the Hague and arrived at definite conclusions with regard to the transfer of power and the Commission of the United Nations helped in the implementation of those terms. In December, 1949, the sovereign State of Indonesia came into existence.

(2) Treatment of the people of Indian origin in South Africa.—India lodged a complaint with the General Assembly alleging that the Union of South Africa was discriminating against the people of Indian origin. The Union of South Africa contended that the matter in dispute was concerned with the domestic jurisdiction and consequently the U. N. O. had no right to intervene. General Assembly's opinion was that there should be no discriminatory treatment of the Indians and the Cape Town Agreement of 1927 between India and the Union of South Africa was binding one. General Assembly directed on 14th May, 1949, India, Pakistan, and the Union of South Africa to hold Conference at Cape Town in February, 1950, an agenda was agreed upon for the Conference. However, no conference could be held on account of the fresh discriminatory legislation enacted by the Union of South Africa. Although the U. N. O. has appointed commitees to report on the matter and many suggestions have been made to solve the deadlock, nothing has come out of it on account of the adamant attitude of the Union of South Africa.

(3) The Palestine Question.—Palestine had no peace since the ending of the First Word War. There was a bitter conflict between the Arabs and the Jews. Each was determined to eliminate the other. In 1947, the General Assembly established a U. N. Sub-Committee on Palestine. The General Assembly accepted the majority

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plan of Sub-committee which proposed termination of the British mandate and withdrawal of British troops from Palestine by August 1948. The General Assembly appointed a United Nations Palestine Commission to implement its recommendations. But, as the situation began to worsen a suggestion was made to put Palestine under the trusteeship system but without any success. In April, 1948. a Truce Commission was appointed by the U. N. In May, 1948. Great Britain withdrew its troops and at once the Jewish State of Israel came into being. The latter was attacked by all the Arab States but they were all beaten one by one. The U. N. Mediator and the Truce Commission managed to bring about a truce among the parties but the same ended on 9th July, 1948. On the report of the Mediator, the Security Council called upon the parties to stop fighting and threatened to adopt enforcement measures in case a cease fire was not ordered. The Security Council held many meetings and gave cease fire orders but they were all ignored. In spite of initial failures, the U. N. established the U. N. Relief and Works Agency for Palestine Refugees. The agency has done a lot of useful work.

On December 3, 1977, the U. N. General Assembly, recommended the formation of a Palestine homeland and the Palestine Committee was appointed to assist the U. N. in the implementation of the recommendation.

The problem of Palestine still remains unsolved. The relations between Israel and its Arab neighbours are still very much restrained and there are frequent clashes. However, it cannot be denied that the United Nations has done a useful work in Palestine.

(4) Korean problem.—Korea was liberated in 1945 after the fall of Japan. South Korea was put under the control of the United States, Great Britain and China. North Korea was put under the control of Soviet Russia. The United Nations appointed many commissions for the establishment of a democratic administrative system in Korea but there was no meterial result. In 1949, the occupying forces withdrew from their respective areas. In June, 1950. North Korea invaded South Korea. The matter was put before the Security Council and the latter directed North Korea to withdraw its troops from South Korea. As North Korea refused to withdraw, the Security Council passed a resolution. United Nations appointed General Mac Arthur as its Commander and troops were sent by many members of the United Nations to fight under the United Nations banner in Korea. After some time the offensive of North Korea was halted and the U. N.'s forces began to push into North Korea. Efforts were made to bring about a cease-fire in Korea but they proved unsuccessful on account of the opposition of Russia. There were difficulties with regard to the fixation of the

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armistice line and the exchange of prisoners of war. In July, 1953, a truce agreement was signed and hostilities ended. The neutral Nations Repatriation Commission headed by India tackled the delicate problem of repatriation of the unwilling prisoners of war.

On Sept. 6, 1976, an agreement was signed. It speaks out future security arrangements in the truce village of Panmumjoin in the demilitarised zone separating South and North Korea under it two sides agreed that the joint security area 85 yards in diameter will be split into two halves along the military demarcation line with military personnels each side barred from crossing the line and entering the other side of the area ; all non-military personnel of both sides will be allowed to move freely within the area, crossing the demarcation line, each side will be responsible for assuring the safety of the other side who legally come into its portion. The U. N. Command signed the armistice which ended the Korean war.

U. N. Secretary General, Kurt Waldheim said, the Security Council had proved its value, time and again as an indispensable means of defusing critical situations where a major confrontation threatened. In fact, there had been and were conflicting situations which members States were very reluctant to have considered by the Security Council. But it cannot be denied that the provision of veto has greatly affected the effeciency and it has not been able to perform those works which were entrusted to it.

In the event of Gulf war (1991). The role of Security Council was laudable. The Present Secretary General of the U. N. Mr. Bowrtros Ghali is also trying to keep pace with the demanding global situations. His efforts of maintenance of global peace are, successful.

According to *Fuller* ; "The United Nations has been called upon in most of the political crisis since the end of World War II—the Balkans, iron, Palestine, the Corfu Channel, Kashmir ; Indonesia, the Berlin and Korea. Each case was different ; sometimes open warfare had broken out, sometime crisis seemed about to tip the delicate balance of forces and precipitate a general conflict. All cases had something in common—the parties were stubborn—the debate tedious–the negotiations protracted. Only occasionally were clear-cut solutions arrived at, and some of the questions still remain to trouble the world. Kashmir, for instance is still unsettled. The borders of Israel are still the scene of conflict and the uneasy armistice still governs where peace is badly needed. There were other situations in which little was accomplished beyond a debate. Yet most of the cases represent, in varying degrees in accomplishment of the United Nations system." *Fuller–United Nations and World Community, p. 48.*]

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Q. 109. What is the future of the U. N. O.

A. When the United Nations was established in 1945, it was a great hope that the mankind could be saved from the scourge of war and the world peace could be established But, this hope could not stand for long as the United Nations came in the grip of crises for the last few years. This was caused by the change of dominance over world body from the big powers to the weak nations. At this the U. S. threatened the world body to withhold or curtail its contribution to the fund of the U. N. The U. S. did so for sometime, but later had softened its attitude.

But the question is : How long would the United Nations Organisation survive ? Most of the resolutions passed by the U. N. Assembly in its 29th and 30th session put emphasis on the redress of the economic injustices caused by the big powers. A system based on imperialism and exploitation of the down-trodden is bound to crash sooner or later. U. S. A. wanted to reverse the tide. Mr. George Ball, a U. S. representative said : The major powers were to safeguard the peace of the world by cracking together the heads of small nations when their parochil quarrels threatened world peace." Now, the U. S. is unable to crack the heads Afro-Asians despite their differences as they are united to fight against the big powers. In desperation, it is condemning the U. N. agency that it is being misguided by the small political powers.

The U. N. Development Decade has been a disappointment too because of the unwillingness of the big powers to recognise the needs of the backward nations. The U. N. Committee on Development plan noted that the enunciation of the principles of new international economic order represents "a historic break from the past," and reflected a shift in, political power.

The goal of the universality of membership of the U. N. far from facilitating the solution of international problems, is complicating the matters. It is true that disenchantment with the U. N. has been growing all round. The realistic analysis that the situation is inadvertable. Dr. Kissinger has once expressed his fears about survival of the U. N. and criticised Third World Countries which are trying to turn it into "a weapon of political warfare." The differences are bound to be there. If there be no differences there would be no need for a world body. Liquidation of the U. N. would leave sectional bodies and international finances as the only organised associations. A modern body without the principle of universal membership is unthinkable. Besides, the U. N. is also doing very useful work through international co-operation in the fields of health, education, control of dangerous drugs. etc.

It is believed that as long as the U. N. remains a child of the

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international politics, wherein sovereign States with conflicting interests freely interact for pursuing selfish ends, the future of the organisation would be uncertain.

Q. 110. Give a short account of the various attempts made out by the U. N. O. at achieving disarmament to secure international peace.

A. Between 1918 and 1939 many unsuccessful attempts were made to reach international agreement on the limitation of armaments. In 1941, the Atlantic Charter looked forward to measures which will lighten for peace-loving peoples the crushing burden of armaments. The Moscow Declaration of October 1943, by the American, British, Chinese and Russian Governments, advocated a general agreement with respect to the regulation of armaments. Article 26 of the United Nations Charter provides that the Security Council should draw up plans for the regulation of armaments. The United Nations set up in 1946 the Atomic Energy Commission for the elimination of the use of atomic energy for destructive processes, and in 1947 the Commission for Conventional armaments for the general regulation and reduction of armaments and armed forces. These Commissions were seperately established as it was thought that the chances of an agreement on atomic control would be lessened if it made contingent on an agreement on general disarmament.

In the Conventional Armaments Commission the U. S. S. R. argued that nations must first disarm and then evolve a system of control and inspection. The Western countries on the other hand wanted reduction of armaments accompanied by control and inspection. In 1948, the U. S. S. R. proposed a reduction of armed force by one third but this was rejected by the West on the ground that it would continue the Russian dominance in the field of Conventional armaments.

In 1951, in view of the very limited progress made, two commissions were merged into the United Nations Disarmament Commissions. The U. S. S. R. continued to demand the reduction of armed forces by one-third, the immediate prohibition of atomic weapons followed by full exchange of information and the creation of an international control organisation. The West regarded disclosure and verification of information as a first and indispensable step. In 1952 there were differences of opinion as to the size of the armed forces of France, the U. K. the U. S. A., and the U. S S. R. and corresponding disagreement as to the effect of a reduction of one-third in these forces. The West powers wanted international supervision at all stages of the proposed reduction in conventional and atomic arms and in 1953 suggested that as a first step the armed forces

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should be reduced so that French, British and American forces would be equal to those of U. S. S. R. and China.

In May, 1955 the U.S.S.R. fundamentally altered its approach. It agreed that elimination of nuclear arms should not begin until cuts in other arms had been made, and that there should be a reduction of forces to absolute level rather than proportional cuts. Its agreement, however, was subject to the abolition of *foreign bases* which would have involved the withdrawal of U. S. ground and air units from Western Europe and the Far East. The U. K. demanded further concessions in August 1955, insisting on unlimited rights of inspection over all places where war-like preparations could be carried on. The U.S.A. suggested aerial supervision supplemented by inspectors posted on the ground. At the international discussions held in London in April and May, 1956, the U. S. S. R. continued to give priority to the questions of reductions in Conventional armaments, but was criticised by the Western powers for refusing to give the controlling organisation the power to act in the event of any violations of the proposed disarmament agreements.

On 4th November, 1957, Russia declared its decision not to participate in the Disarmament Conference and its sub-committees as they were at that time composed. On 19th November, the General Assembly decided to enlarge the Disarmament Commission to twenty-five members but Russia still persisted in its decision.

On 15th March, 1959, the tenth power Disarmament Conference opened at Geneva. America proposed three immediate measures :

Para (1) Ban on nuclear weapons in outer space, (2) Audit and verification of missile launching, and (3) Halt of military production of nuclear materials. American delegate proposed the immediate implementation of these Russia agreed to ban the nuclear weapons provided the Western Powers would destroy their stock of nuclear weapons. It proposed a three-phased programme for disarmament, viz.,

Phase 1—A year to eighteen months for reduction of the armed forces of America, Russia, and China, France and Britain to specified limit ; Phase 2—Eighteen months to two years for disbanding of the remaining forces and elimination of foreign bases ; and Phase 3—One year in which all nuclear weapons would be destroyed. On 28th March, 1960, the West outlined a ten-point plan for the international inspection, supervision and control of agreed world disarmament measures. The talks ended in smoke.

Partial Test Ban Treaty, 1963 prohibited nuclear test in the

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atmosphere, in outer space and under water. This treaty has been signed by many countries, but France and China have refused to sign it.

Outer Space Treaty, 1967 banned nuclear and other weapons of mass destruction from outer space and provided for the demilitarization of celestial bodies.

Treaty for the Prohibition of Nuclear Weapons, 1968 prohibited further spread of nuclear weapons.

The United Nations has declared the decade of 1970 as Disarmament decade. On the 15 March, 1970 the Non-Proliferation of Nuclear Weapons Treaty came into force which has been signed by many States, but India has refused to sign on it.

Another significant achievement in the field of disarmament is the Sea Bed Treaty 1961. This treaty has been verified by 30 States and has come into force in 1972. According to the Russian Prime Minister, Kosygin, this treaty is "an important act in international affairs, a first step towards complete demilitarization of the sea."

Geneva Disarmament Conference commenced from 17th April, 1974. To conclude in the words of Daniel S. Cheever, "Progress towards disarmament depends heavily on concurrent progress towards an International order. No International Disarmament Organisation of itself can make the peace by transforming the nature of International relations."

The 30-nation Disarmament Conference ended on June 1976 which banned chemical weapons and environmental warfare. On May 12, 1976 the U. S. A. and Soviet Union entered in a treaty regulating under-ground nuclear tests for peaceful purposes. It limited the test for peaceful nuclear devices to a maximum power equivalent to 1,50,000 tons of TNT and which allowed site inspection by both sides.

The World Law Conference, ended in Manila on August 26, 1977, calls for dismantling nuclear Weapons and declare a moratorium on the further development of atomic weapons and to establish an international science control board to monitor observance.

Indian Prime Minister Mrs. Gandhi declared in Parliament that India will not sign on the proliferation of Nuclear Weapon Treaty until and unless the big countries does the sign on the said treaty for disarmament.

Recent Developments in the field of Disarmament—Following recent developments in this regard deserve special mention :—

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Star War.—N.B. For this please see answer to question 31.

New Weapons to Counter ICBM'S.—The U S. has been studying new types of nuclear weapons capable of attacking newly deployed Soviet mobile Inter-Continental Ballistic Missiles.

Leaders appeal for disarmament.—It may be recalled that last year the U.SSR. suspended nuclear tests (which later on extended to 6th August, 1986) and urged U. S. to join the morattorium. The six leaders of India, Greece, Sweden, Mexico, Agrentine and Tanzania, urged U. S. to join the Soviet Freeze and also offered a detail plan for monitoring a test ban with their own instruments and observers.

Non proliferation Treaty. —A lot of pressure is being exerted on India by the western countires particularly the United States, to Sign Non Proliferation Treaty (NPT). Five nations conference was suggested by U.S. but India opposed it. On Mach 10, 1992 during the visit to America Indian Foreign Secretary Mr. J N. Dixit, rejected the offer saying that the N. P. T. favours the nuclear states hence India cannot be one of the signatories. However China signed the Treaty.

U S. Developing Anti-matter Weapon.—It has been reported that the U.S. has been seriously considering the possibility of developing a new kind of weapon system using anti-matter. It is pointed out that when anti-matter meets ordinary matter, the result is total annibilation.

U.S. Raising Arsenal for Germs War.—It is also reported that the U.S. is quietly increasing its research into germs by closing some of the world's reariest and deadliest of diseases to increase its arsenal for germs warfare.

Failure of U.S.—U. S. S. R. Summit at Reykjauk (Iceland) of October 1986.—The long awaited Disarmament summit between American President, Renold Reagan and Soviet Union Leader Mikhail Gorbachov held on October 11 and 12 at Rejkjauk proved to be a failure as it did not produce any tangible agreement on the vital issue of reduction of nuclear weapons.

Conclusion —"Effective adequate disarmament depends primarily upon the development of a climate of trust and mutual understanding among the major powers. Moreover.. .....progress towards disarmament depends heavily on concurrent progress towards an international legal order. No international disarmament organisation of itself can make the peace by transforming the nature of international relation.

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Q 111. Give a short account of non-aligned summit and give its achievement.

A. The policy of non-alignment means the pursuit of a independent foreign policy and the avoidance of all entanglements with power and military blocks, support to the principle of freedom of dependent peoples, opposition to racial discrimination in any form, co-operation with all peace-loving countries and with the United Nations to promote internal peace and prosperity without exploitation of any nation by another.

The concept of non-alignment emerged in 'Fifties, when two power blocs were constantly engaged in a cold war. India, right from 1947 followed the policy of non-alignment, Mr. Nehru characterised non-alignment as a "positive and vital policy which flows from our struggle for freedom." In the first conference of non-aligned held at Belgrade in 1961, there were less than 30 members but the members increased in 1964 in the second non-aligned summit held in Cairo. In the fourth summit held in Algiers in 1973 there were 70 members. The cause of the increase in the membership was the sense of unity against imperialist exploitation and the sharpening of the stand against the big powers.

The question of criteria for the assessing a country as non-aligned came up during the preparations of the first conference of non-aligned countries. These criteria were as under:—

(1) The country should have an independent policy based on peaceful co-existence and non-alignment or it should manifest sympathy for such policy. This independent policy must be concrete in substance. Concrete substance is found in the Charter of the United Nations.

(2) The non-aligned country should support the struggle for national liberation. The principle of anti-colonialism has been inscribed in the U.N. Charter also. Most of the non-aligned countries had to fight for national liberation. It is natural for them to show solidarity with peoples and movements striving for the same goal. Thus it is clear that the principle of anti-colonialism, of opposition to any form of foreign domination, should have been inherent in this policy.

(3) It should not belong to any military pact. This condition is essential for two reasons, the affiliation would have resulted in cold war which would be a threat to world peace and the national security of non-aligned countries, and because the non-affiliation would permit an active policy designed to transcend bloc divisons and the cold-war. This policy is an anti-thesis of bloc policy. Pakistan at one time intended to join the circle of non-aligned countries

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but she was not accepted because it did not officially disassociate from the membership of SEATO and CENTO.

(4) The non-aligned nations should not have any bilateral alliance with the great powers. This condition has helped the countries to ward off aggression as well as pursuance and remain in the position of countries able to pursue an independent, non-aligned policy.

(5) It should not allow any foreign country to build military base during the period of bloc divisions and cold war.

Achievements of the summit.—The Non-aligned group of nations has registered, following achievements :

1. Refusal of a large number of countries, particularly the newly independent ones, to be drawn into the confrontation of the cold war.

2. The welcome relations between the great powers is itself the result of the non-aligned movement.

3. Story support to the movements for national independence with considerable success.

4. Even in the economic field, Third World Countries have found a new strength to challenge the old concept of colonialist and unequal relations to assert their right to fair prices for their commodities and also to their sovereignty over their resources.

5. Support to the OPEC in its joint action in demanding a mere realistic price for oil, thus generating demand for a new international economic order.

6. Creation of a special fund for agricultural development at their initiative ; a common fund for financing buffer stocks and initiation of steps for producers' associations.

Q. 112. What is the significance of the non-aligned summit ?

A. Since the concept of the non-aligned emerged in 1961, the political scene of the world has been changed. The most important changes that have taken place are :

1. The cold war has ended although the tensions between the major powers continue ;

2. The process of decolonisation has virtually been completed.

The issue is as to how to make the application of the principle more effective in view of the changes that have taken place in the international situation. Because of it, the non-aligned movement is facing with following threats :—

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(a) There is a threat to the deletion of the concept. This is because of the new applicants for membership of the countries which want to split and weaken the group.

(b) The conflict of the economic interests of the members of the group has threatened this group. The big powers specially U. S. A. is trying its best to split the group by promising favour in the shape of substantial aid to those who support its policies and withdrawing its aid from those countries which oppose it at the forums.

(c) Some countries pose to be non-aligned but have actually joined one or the other power bloc, directly or indirectly.

The Colombo summit must consider following problems :—

(1) To combat unequal relations and the clause domination that poses problems for the Third World Countries in the form of non-colonialism and hegemonial relations.

(2) Peaceful co-existence still remains only an earliest wish.

(3) The vast majority of the non-aligned nations are poor. A break through in securing economic co-operation among the group is considered vital.

(4) The unsatisfactory relationship between the affluent developed bloc and the poor undeveloped group should be improved so as to eliminate, or at least to lessen the disparity.

The majority members of the non-aligned group are lacking financial resources, though they have plenty of resources in raw materials and human skills. The countries now have a better opportunity for greater co operation among themselves to develop their economics for mutual benefit. The summit will review measures for strengthening economic solidarity and co-operation among non-aligned countries. The summit will also review the international political situation and deal with detente, disarmament and interference both covert and overt, in the internal affairs of other States.

The rush of the membership is partly because a new economic factor also emerged—the Arab oil wealth. It has become an important factor in the international scene The non-aligned countries are facing the problem of inflation and increase in the prices of energy, food and fertilizer. The Lima Conference programme was a blueprint for self help. For one thing, some of the members of this group are still inclined to remain one power. Another reason for the increase in the membership is the establishment of the European Economic Community.

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India's former External Affairs Minister. Mr. Y B. Chavan, has called to ensure the unity of the non-aligned, developing countries. Recently in the year, 1984, our Late Prime Minister Smt. Indira Gandhi, who presided the Non-Aligned Conference, has also affirmed the need for safeguarding the solidarity and ensuring co-operation among them.

Conclusion —The threat of delution of the Non-aligned movement through the infiltration of States which are non-aligned, and also through the efforts to soften the stand against the giant powers, has been facing the non-aligned group. Attempts have been made to modify the criteria laid down in 1961 for the admission of the membership to the group. The four-day meeting of the 17-nation Co-ordination Bureau of Non-aligned nations held in June 1976 unanimously decided to recommend the admission of Angola and Comoro Islands which have already gained independence. There was no consensus on the application of countries like Rumania (a Warsaw Pact nation), the Philipines and Turkey (which is a member of NATO and CENTO).

CHAPTER XXIA

PERMANENT COURT OF INTERNATIONAL JUSTICE AND INTERNATIONAL COURT OF JUSTICE

Q 113. Show your acquaintance with (a) three of the decisions and (b) any two of the advisory opinions given by the Permanent Court of International Justice (I. A. S. 1950).

and

Give an account of the constitution and jurisdiction of the International Court of Justice. In what respect does it differ from the Permanent Court of Arbitration ? (I. A. S. 1957).

A. The Charter and the Court.—The United Nations Charter in Art. 92 provides that the International Court of Justice shall be the principal judicial organ of the United Nations and that it shall function according to the statute forming an integral part of the present Chapter.

It is also laid down in the Charter that all members of the United Nations are *ipso facto* parties to the statute of the court and member may become a party to the statute on conditions to be determined by the General Assembly upon the recommendations of the Security Council.

The members of the United Nations are under an obligation to comply with the decision of the International Court of Justice in cases to which they are parties. It is provided that if a party fails

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to comply with the decision of the court the other party has a right to approach the Security Council which will decide as to how the decision of the court be made effective.

The International Court of Justice has to render advisory opinion on any question submitted to it by the Assembly or the Security Council. The other organs of the United Nations and specialised agencies may be authorised by the General Assembly to seek advice of the Court on legal questions arising within the scope of their activities.

The Charter leaves the members of the United Nations free to have their disputes settled by tribunals other than the court by virtue of an agreement.

Organisation of the Court

Judges.—The International Court of Justice is to consist of 15 judges, elected regardless of their nationally from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial officers or who are jurisconsults of repute in International Law. The Court is to consist of fifteen judges, two of whom will be nationals of the same State. These judges are elected for a term of 9 years and can also be re-elected after the expiry of their term. The Court has a President and a Vice-President who are elected for three years.

The judges of the court are elected by the General Assembly and the Security Council from a list of persons nominated by national groups in the Permanent Court of Arbitration or from persons nominated by national groups appointed for this purpose by governments of those States which are not represented in the Permanent Court of Arbitration.

The International Court of Justice has its seat at the Hague. It can also sit and exercise its functions elsewhere whenever it considers it desirable.

Jurisdiction of the court.—The International Court of Justice has to hear and decide dispute arising between States. The court is open to all States which are parties to the Statute. It is also open to States not parties to the Statute on condition which have been laid down by the Security Council. States, not parties to the Statute, can invoke the jurisdiction of the Court if they deposit with the Registrar of the Court a declaration to the effect that they accept the Court's Jurisdiction as specified in the Charter, the Statute and the Rules of the Court and that they undertake to comply in good faith with the decision of the Court as provided in Art. 94 of the Charter. Such declarations may be either general

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that is to say, covering all disputes that may arise or may be particular, that is to say, may be in respect of a particular case.

Thus it may be noted at the outset that consent of the states is basis of the jurisdiction of the court.

The Court may exercise the following three types of jurisdiction :—

(a) Voluntary jurisdiction,

(b) Compulsory jurisdiction,

(c) Advisory jurisdiction.

1. **Voluntary jurisdiction.**—Article 36 of the Statute defines the jurisdiction of the Court as comprising all cases which the parties may refer to it and all matters specially provided for in the Charter or in the treaties and Conventions in force. The disputes can be referred to the Court only when there is an agreement between the parties giving consent to its being referred to it. The agreement to refer the dispute may either be made by the parties concerned or its reference can be made by one of them to the Court.

Thus if the parties to the statute refer a dispute to the courts, the court gets jurisdiction and by virtue of Article 59, decision of the court shall be binding upon the parties.

2. **Compulsory jurisdiction.**—The compulsory jurisdiction of the International Court of Justice is derived from the consent of the States. The Statute stipulates that States which are parties to it may at any time declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other State, accepting the same obligation, the jurisdiction of the court in all legal disputes concerning :—

(a) the interpretation of a treaty ;

(b) any question of International Law ;

(c) the existence of any fact, which if established would constitute a breach of international obligation ;

(d) the nature or extent of the preparation to be made for the breach of an international obligation.

The declaration may be unconditional or may be made on condition of reciprocity on the part of several of certain States or for a certain time. It is provided that declarations such as those made under Article 36 of Permanent Court of International Justice and which are still in force shall be deemed as between the parties

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to the statute of the Inttrnational Court of Justice, to be acceptance of the compulsory jurisdiction of the International Cour. of Justice for the period which they still have to run and in accordance with their terms.

Provided that this declaration shall not apply to :

(i) disputes, the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future ;

(ii) disputes, with regard to matters which are essentially within the domestic jurisdiction ;

(iii) dispute, arising under a multinational treaty unless (a) all parties to the treaty affected by the decision are also parties to the case before the Court ;

(iv) the United States of America specially agrees to the jurisdiction.

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

Advisory Jurisdiction.—The Court has to render advisory opinion on questions referred to it by the General Assembly and by the Security Council. The other organs of the United Nations and specialized agencies on being authorised by the General Assembly can also ask for the advice of the Court on matters within the sphere of their activities. The General Assembly has authorised a number of other organs and, specialized agencies to seek advice of the Court on legal questions. The Trusteeship Council, Economic and Social Council, World Health Organization, International Civil Aviation Organization and International Bank for Reconstruction and Development are some of the specialized agencies and organs of the United Nations that are privileged to seek advice of the International Court of Justice on legal questions arising in the sphere of their activities. The opinion of the Court should be sought by making a written request containing an exact statement of the question on which opinion is asked for and accompanied by all documents which are likely to throw light on the matter.

According to Nagendra Singh, "The function of the Court to give advisory opinion to International organisations though it does not lead to any binding decision, is of great value in building public opinion." In this view, the statute of International Court of Justice should be amended so as to increase the advisory jurisdiction of the Court, It will contribute immensely to the development of International Law.

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Law applied by the Court —The International Court of Justice is bound to decide a case brought before it in accordance with International Law. It has, in the determination of the questions raised before it, to apply :—

(a) International Conventions whether general or particular, establishing rules expressly recognised by the contesting States ;

(b) International custom as evidence of general practice accepted as law ;

(c) The General Principles of Law recognized by civilized nations ;

(d) Judicial decisions and the teaching of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (Art. 38 of the Statute of International Court of Justice).

Article 59 of the Statute makes it perfectly clear that a decision of the Court has no binding force except between the parties and in respect of the particular case in which it was given. This provision shows that a previous decision of the court is not an authority which must be followed but that it possesses a persuasive value.

Execution of the decision of the Court.—The Charter imposes an obligation on parties to a decision of the court to comply with the decision. On the failure of a party to comply with the decisions the other party is permitted under Article 49 of the Charter to take the matter to the Security Council. The Security Council may then consider the matter and may make recommendations or decide upon measure to be taken to give effect to the judgment. Security Council, however, does not seem to be bound under Article 94 of the Charter to enforce the judgment of the court against the recalcitrant party. As *Oppenheim* observes, "there is room for clarifying Article 94 of the Charter so as to make the action of the Security Council mandatory and not merely permissive, and for amending the Charter so as to free the action of the Security Council in this respect from the shackles of the requirement of unanimity of its permanent members."

In order to understand properly the progressive development of International Law by I. C. J. it will be necessary to discuss briefly some recent cases decided by Court.

(1) Nicaragua v. U. S. (1984).—Recently a case was filed by Nicargua against the U. S. charging the U. S, Government with Intervention in Nicaraguan affairs and efforts to topple the Government in Nicaragua. In an interim judgment, the Court unanimously

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held that the U. S. Government should cease mining Nicarguan ports. By a majority of 14 to 7, the Court also held that the Independence of Nicaiguan should not in any way be prejudiced by any military or paramilitary activities by the threat of the force. (For the Facts and Details see also latest International Developments).

(1-A) Greece v. Turkey.—This case was decided on September 11, 1976. In this case the Court clarified law relating to grant of interim measures of protection. Besides the above decision, the advisory opinions of I. C. J. have greatly encouraged the progressive development of international law and have helped the function and development of the international organisatins.

(2) Fisheries jurisdiction (Merit) case, 1974.—In this case, the Court clarined the law relating to validity of the establishment of the fisheries jurisdiction by Iceland and concept of preferential rights.

(3) Nuclear Tests Case (22 June 1973).

1. The Corfu Channel Case.—This was the first case which came before the Court, during October 1946, the mines in the Corfu Channel damaged certain British Warships and caused injury to British naval personnel." The United Kingdom alleged that Albania was responsible while Albania denied this charge. The matter was taken by the United Kingdom to the Security Council in January, 1947. The Security Council recommended that the disputants should refer their dispute to the International Court of Justice.

The United Kingdom by its application asked the Court, to decide that Albania was internationally responsible for the loss and injury and was liable to make reparations. Albania by its letter agreed to appear before the Court but it objected to the admissibility of the application of the United Kingdom on the ground that the application was not in conformity with Security Council's recommendation. The Court rejected this objection. Thereafter, the disputing States entered into a special agreement whereby the following two questions were submitted to the Court :—

"1. Is Albania responsible under International Law for the explosions which occurred on October 22, 1946, in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation ?"

"2. Has the United Kingdom under International Law violated the sovereignty of the Albania People's Republic by reason of the acts of the Royal Navy in Albanian waters on October 22,

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and on November 12 and 13, 1946, and is there any duty to give satisfaction ?"

On the first question, the Court held that "the People's Republic of Albania is responsible under International Law for the explosions which occurred on October 22, 1946, in Albanian Waters and for the damage and loss of human life that resulted therefrom." On the second question it was held that the United Kingdom did not by act of its navy on October 22, 1946 violate the sovereignty of Albania and that the United Kingdom by the acts of navy on November 12 and 13, 1946 did violate the sovereignty of Albania. The Court further held that the declaration of the Court to the effect that the United Kingdom violated the sovereignty of Albania by the acts of its navy on November 12 and 13, 1946 was in itself appropriate satisfaction.

With the result Albania was held liable to pay £843, 947 to the United Kingdom.

(4) Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal. [Advisory opinion of the I. C. J. of 20 July, 1982].

In this case a former staff member of the U. N. secretariat had challenged the Secretary General's refusal to pay him repatriation grant unless he produced evidence of having relocated upon retirement. The U. N. Administrative Tribunal had decided that the staff member was entitled to receive the grant and, therefore, to compensation for the injury sustained through the non-payment. The matter came before the International Court of Justice in its advisory Jurisdiction. The Court pointed out that its proper role was not to re-try the case already dealt with by the Tribunal. Further the Court concluded that the Administrative Tribunal neither erred on a question of law relating to provisions of the Charter of the U. N., nor committed any excess of its jurisdiction or competence.

CHAPTER XXIB

INTERNATIONAL ORGANISATIONS AND SPECIALISED AGENCIES

Q. 114. Write short notes on the following :—

(a) The United Nations Educational, Scientific and Cultural Organisation (UNESCO) ;

(b) The International Labour Organisation (I. L. O.) ;

(c) World Health Organisation (W. H. O.) ;

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(d) Food and Agriculture Organisation (F. A. O.) ;

(e) International Fund for Agricultural Development (I. F. A. D.) ;

(f) Universal Postal Union. (U. P. U.) ;

(g) International Tele Communications Union. (I. T. U.) ;

(h) World Meteorological Organisation (W.M.O.),

(i) International Atomic Energy. (I. A. E. A.).

A. (a) The United Nations Educational, Scientific and Cultural Organisation.—The Constitution of the UNESCO was signed by fifty four States on November 16, 1945. The preamble of the Constitution states that 'since war being in the minds of men it is in the minds of men that the defences of peace must be constructed and that everlasting peace must be founded upon the intellectual and moral solidarity of mankind.'

The purpose of the Organisation is to promote collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law, for human right and fundamental freedoms.

The membership of the UNESCO is open to all the members of the United Nations. Its Organs are General Conference, Executive Board, and Secretariat. The General Coference which consists of the representatives of the member-States determines the policy and chalks out the programme of the organisation. The Executive Board consists of eighteen members elected by the General Conference and its function is to carry out the programme adopted by the Conference. The Secretariat consists of the Director-General and the staff. The Organisation is assisted on its work by various National Commissions. The UNESCO has been brought into relation with the United Nations under an agreement signed in 1947.

The activities of the UNESCO fall under the following eight broad headings :—

(1) Education.—Eliminating illiteracy and encouraging fundamental education, raising educational standards, promotion through education, greater respect for human rights, making available information on educational techniques.

(2) Natural Sciences.—Creating greater collaboration between scientists and encouraging the popularization of Science.

(3) Social Sciences.—Encouraging the study of the psychological and social problems involved in the development of mutual understanding such as racial prejudice and religious differences.

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(4) Cultural Activities.—Developing cultural exchanges between member States and giving people access to work of art, literature and philosophy.

(5) Exchange of Persons.—Providing information as to the opportunities for work and study abroad and providing travelling fellowships.

(6) Mass Communication.—Keeping the public informed about the work of UNESCO and significant events in the field of education, science, and culture and campaigning to help the people to obtain easier access to knowledge.

(7) Rehabilitation.—Assessing and making provision for the educational needs of schools, libraries and scientific institutions on war devasted areas and under-developed countries.

(8) Technical Assistance.—Providing expert advice in the fields of fundamental education, teacher-training, technical and general education, scientific research and scientific advisory services. Member States are advised in such matters as their literacy campaigns, school building programmes, surveying of mineral resources, teacher-training and development of electrical engineering.

Future of UNESCO.– (a) Now-a-days the UNESCO is a centre of controversy over the growing politicalisation of international body. Canada said that this agency should not discuss political problems. U. S. A. said that the UNESCO has anti-Israel attitude and threatened that it would stop annual subscription until it would withdraw its earlier resolution. This created the organisation's budgetary crisis because U. S. Contributions account for a quarter of UNESCO's budget. In April, 1977, however, the U. S. Government decided to pay $ 43, 115,039 in over due contribution to the UNESCO for the years 1975 and 1976. The way was paved for renewed U. S. contributions when the subsequent general conference last October allowed Israel to engage in activities of the "Europe Group" of UNESCO member countries something that had been passed two years earlier. (The Times of India, dated 30th April, 1977).

(b) The International Labour Organisation.—This is an important international organisation which though closely connected with the League has survived it. This organisation (I. L. O.) which is a creation of the Treaty of Versailles, provided that the original members of the League shall be the original members of the Organization and that membership of the League of Nations shall carry with it the membership of the Organization. After the extinction of the League, the chairman of the governing body of this Organization entered into an agreement with the President of the Economic

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and Social Council for the purpose of bringing International Labour Organization into relationship with the United Nations. This agreement was approved by the General Assembly and International Labour Organization came into relationship with the United Nations.

There are three organs of the I. L. O., the General Conference, the International Labour Office and the Governing Body. The General Conference is composed of four representatives of each of the members. Out of these four representatives two are government delegates, the third represents the employers and the fourth represents the workers. All the four representatives are entitled to vote at the conference which meets at least once a year. The conference adopts recommendations on the vote of the two-third of the members.

A recommendation of the conference enunciates principles for the purpose of guiding the States in the matter of labour legislation. States are not bound to make labour legislation on the principles contained in the recommendations of the Conference but they are bound to place these recommendations before the proper legislative authority. A convention of the conference though not signed by the delegates of the Member States is binding on the Member States which are under an obligation to bring it before the proper legislative authority for enactment or other action. The Member States are bound to make report annually to the I L. O. as to steps taken to bring its legislation into conformity with the convention of the conference.

The International Labour Office is the permament Secretariat of the I. L. O. and is located at Geneva. It prepares documents for the meetings of the conference and the Governing Body studies and reports on social and economic questions and collects and distributes information on the subject. It makes a survey of the application of the conventions and recommendations of the conference in the various States of the world. The Labour Office has its branches at London, New Delhi, Ottawa, Paris, Rome, Shanghai and Washington.

The governing body is the executive organ of the I.L.O. It is composed of 48 members, out of which 24 represent Governments, 8 elected by employer's delegates to the conference and 12 represent labour and elected by workers delegates to the Conference. The Governing Body appoints the Director General of the International Labour Office, supervises the work of the Labour Office, prepares agenda for the conference, conducts investigations and makes studies through various committees i

Besides these organs the I.L.O. acts through various specialized

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commitees. The I.L.O. has since its establishment been engaged in promoting social progress throughout the world.

Future of I.L.O.—Recently America has served a notice of its intention to quit International Labour Organisation as a protest against the tactics of Arab to use the Israeli issue to stall many of its activities. This step is taken to realise the members of this organisation that it will be a crippled organisation without American financial assistance, as America contributes 25% of its finances, if the Arabs adopt a defiant stand against America. The condition for the withdrawal of the "quit-notice" is that the resolution adopted by I.L.O. condemning Israeli occupation of the Arab territory should be cancelled by I.L.O. Assembly. The other condition was that the I. L. O. should constitute a special committee to screen all resolutions to keep out any touch of politics. The majority in the I.L O. has turned down these conditions. While withdrawing U.S.A. from the I.L.O. on 1st November, 1977, President Carter told that the U.S.A. would rejoin the organisation if the I.L.O. ended its involvement in political issues. But the U.N. Secretary-General Dr. Kurt Waldhiem rightly described the U.S.A. decision as a "retrogressive step."

(c) World Health Organisation (W.H.O.).—The promotion of social interests common to all the States requires co-operative action as it is not within the powers of individual States to cope with the huge problems connected with these interests. Public health consstitutes one of the major social interests in promotion of which the whole community of nations is interested. International co-operative action in the field of public health dates from 1892 when the International Sanitary Convention was signed at Venice. This was followed by a number of Cholrea, Plague Conventions. Further improvement in this direction was made through revised conventions. The League of Nations established its own Health Organization by setting up a Health section in its Secretariat and Health Committee composed of qualified representatives of various States.

The establishment of the United Nations made co-ordination of the various health activities possible and the result was that a conference in which sixty-seven States took part was held in 1946 in New-York and present World Health Organisation was established. This W H.O has now taken over the health work performed by the United Nations Relief and Rehabilitation Administration (U N.R. R.A.) which was established in 1943 for carrying out general relief work in areas occupied by enemy armies during the war.

The World Health Organisation has its objectives 'the attainment by all peoples of the highest possible level of health' Its activities include advisory services to the nations of the world for

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development of their health administration, and central technical services for promotion of the study of the health problems, establishment of an international pharmacopoeia and publication of health statistics.

The main organs of the World Health Organisation are the World Health Assembly. the Executive Board and the Secretariat. The World Health Assembly is the legislative organ and meets once a year to determine the policy and the programme of the World Health Organisation. The Executive Board is a smaller body and meets at least twice a year to give effects to the decisions of the General Assembly. The Secretariat under the Director General is engaged in the administrative work of the World Health Organisation. Besides this, there are a number of Expert and Technical committees which assist the organisation in the discharge of its functions.

(d) Food and Agriculture Organisation (F.A.O.).—This is another important socio-ecomic organisation and is generally known as the Food and Agriculture Organization. It was established in 1945 and is highly specialised agency having for its objectives the promotion of research in the field of agriculture, the advancement of effective methods or production and distribution of food products and the raising of standards of nutrition. The following are the organs of Food and Agriculture Organisation :—

(i) Conference composed of representatives of the member States.

(ii) Executive Committee appointed by the Conference.

(iii) Director General for the supervision of the administrative Bureau.

(e) International Fund for Agricultural Development.—This agency came into existence on December 2, 1977, after ratification by 52 countries. It will hold its first meeting in Rome, it will be a specialised agency of the U N. with its provisional headquarter at Rome. Its aim is to help developing countries to grow more food. It is represented by the industrial, the oil producing countries and developing countries and the veto power is equally distributed among its members. Now there are 91 member States.

Universal Postal Union (U.P U.)—This agency was established in 1876 but its constitution was amended from time to time and was later on connected with the General Assembly in 1947 by a special agreement.

The main object of Universal Postal Union is to encourage international co-operation among the different postal Services in the World. According to the provisions of the U.P.U. any sovereign

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State may become the member of this Union. Thus for admission of a new "State two-third majority of existing members is very necessary.

Following are the main organs of U.P.O :—

(a) The Congress.—Congress holds its session once in every five years. Each member States are represented in the Congress and are entitled to give one vote. The activities of the Congress is of democratic systems.

(b) Executive Committee.—The Executive Committee is comprised of 20 members who are elected by the Congress. Its office is situated in Berne.

(c) Bureau.—Bureau is the secretariat of the U.P.O. and is also situated in Berne.

International Tele-Communication Union.—(I.T U.)—It was established in 1947 and started its functions since January 1, 1949. Following are the three main aims of this Union :

(a) To achieve international co-operation for the development of all types of international tele-communication.

(b) To ensure technical facilities and to raise efficiency of tele-communication.

(c) To harmonise or provide the activities of the member States to achieve the main object to develop the tele-communication facilities.

Organs.—(i) Pleni-Potentiary conference ; (ii) Administrative conference ; (iii) Administrative Council ; and (iv) secretariat.

World Metrological Organisation.—(W.M.O.)—Following are the purposes and functions of the W.M.O. :—

(a) To promote the establishment and maintenance of the systems of rapid exchange of weather information.

(b) To promote the standards of meotrological observation and uniform publication of observation and statistics and application of meteorology to aviation, shipping, agriculture and other human activities.

(c) To encourage research and training in the subject of meteorology and to assist in co-ordinating the international aspects to such research and training.

(d) To encourage and develop the world-wide co-operation in establishment of organisation.

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Organs.—Following are the main organs of W.M.O. :—

(a) Congress.

(b) Executive Committee.

(c) Regional and technical Commissions created by the Congress ;

(d) Secretariat situated at Geneva headed by a Secretary General.

International Atomic Energy Agency (I A.E.A.).—In December, 1954, General Assembly passed a resolution that a conference should be called for peaceful uses of atomic energy. An International Conference was held in 1955 by the member States to consider a draft for the statute of the International Atomic Energy Agency, which came into force from July 29, 1956.

The main object of this agency was to ensure, assistance provided by it is not used in such a way as to further any military purpose.

Organs.—The General Conference consists of all the existing members and held its session every year. The Board of Governors comprises of 25 members. Board of Governors appoints a Director General for four years. He carries out the Administrative functions of the agency. The head office of the Agency is situated in Vienna.

Human Rights

Q. 115 What are the provisions given in U.N. on the human rights. [I A S. 1979, 1961, P.C.S. 1975, 1969, C.S.E. 1979].

A. Human rights are the fundamental rights or natural right which he got by birth. As fundamental rights cannot be taken away by the legislature or by the acts of government. Thus human rights are not created by any legislation.

U.N. Charter and human rights.—The Charter of U N. provides a significant advancement so far as faith in respect of human rights is concerned. All the organs of the U N touch in greater or less degree upon the subject of human rights. One of the greatest impacts of the Second World War and the establishment of the U.N. was that the individual which was recognised only an object of international law, was recognised a subject of international law, popularly, referred as the "world law". The individual was not only protected by this law but could even in some cases seek his own remedy. State could no longer rely on the plea of domestic jurisdiction in respect of human rights. The Second World War went a long way to vindicate human rights.

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Provisions of the Charter concerning Human Rights.—All the organs of the U.N. deals with the human rights. The preamble of the Charter begins with the words, "we the people of the United Nations" and to say the least, these words are neither superfluous nor have crept in the preamble incidently. The beginning words "we the people of United Nnations" are very meaningful. It shows the objectives which the framers of the Charter wanted to achieve. After having made this significant innovation in an international beauty, the preamble further reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."

Article 1 of the U.N. Charter provides that it is one of the purpose of U.N. to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 55 of the U.N. Charter provides to promote Universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Thus Articles 55 and 56 bind member State to observe and respect human rights. This view finds support from the interpretation of these provisions given by the World Court. The International Court of Justice gave its opinion in the context of the observation of human rights in a territory having an international status.

Economic and social council also deals the observance and respect of human rights and fundamental freedoms for all.

Human Rights and Domestic Jurisdiction.—Article 2 (7) of the U.N. Charter prohibits the U.N. to intervene in the matters which are essentially within the domestic jurisdiction of any State. It may be noted that domestic and international aspects are closely interwoven. Almost every problem that concern international relation comes within the domestic jurisdiction if it has become the aspect of international obligation undertaken by the State. Human rights and fundamental freedom, having become the subject of a solemn international obligation and a fundamental purpose of the Charter, are not any longer a matter which is essentially within the domestic jurisdiction of the members of the U. N.

It may be noted that although Article 2 (7) prohibits the U.N. to intervene in the domestic affairs of the State but there are exceptions in respect of the application of enforcement measures under the Charter. Thus, if violation of human rights give rise to a dispute or situation which poses a threat to international peace and

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security, the Security Council may take steps under Chapter VII of the Charter.

Gross violation of human rights cannot be said to be under domestic jurisdiction. The case of Bangla Desh is one of the most recent case in this connection and it was considered that there was gross violation of human rights and perpetration of the crime of genocide and it was not a case of domestic jurisdiction.

Q. 116. Write a short note on Human Rights Commission and Universal Declaration of Human Rights ? [I.A.S. 1977, 1967].

A: The Commission on Human Rights is established by the Economic and Social Council in 1946 —It is consisted of 32 Members elected for three years term and meets annually for a period of five or six weeks. All decisions of Commission are made by a majority of the members present and voting. The Commission submits a report on each session to the Economic and Social Council.

The principal function of the Commission have been the preparation of the texts of the Universal declaration of human rights ; the convention on the Political Rights of Woman and draft Covenant, supplementing the Universal Declaration. It also publishes "Year Book on Human Rights."

In view of the important functions performed by Human Rights Commission : Italy and Spain have proposed in the Special Committee on the Review Charter of the U.N. and on the strengthening of the Role of the Organisation, which held its session from 14th February to 11th March, 1977 in Newyork : that the office of the High Commission on Human Rights be established.

Commission on Human Rights established the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1947.

Universal Declaration of Human Rights —The declaration of human rights was a historic event of the U N. This declaration was prepared by the Commission of Human Rights in 1948 and was adopted by the General Assembly on December 10, 1948.

Provisions of the Declaration on Human Rights.—There are 30 Articles and preamble deals with both civil and political rights and economic, social and cultural rights. The preamble refers to the "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women which the people of U.N. have reaffirmed in the Charter of U.N. and their determination to "promote social progress and better standards of life in larger freedoms". Articles 1 to 2 provides the General

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rights; Articles 3 to 21, Civil and Political Rights ; Economic, Social and Cultural Rights are provided in Articles 22 to 27 and Articles 28 to 30 deals with the conclusion.

Q. 117. Write short notes on the following :

(a) European Convention on Human Rights and Fundamental Freedoms, 1950

(b) American Convention on Human Rights, 1969.

(c) The Covenant on Civil and Political Rights, 1966.

A. The European Convention on Human Rights comprises of 66 articles besides a preamble, which are divided in V sections. Article 1 deals that the parties to the convention would respect the rights and freedom of every member. These rights and freedoms have been taken from the Universal Declaration of Human Rights and comprises of Articles 2 to 18. Article 19 provides for the establishment of (1) European Commission on Human Rights : (2) A European Court of Human Rights ; Articles 20 to 30 deals with the power and function of the Commission. Articles 38 to 56 deals with the power and functions of the Court.

It may be noted here that Article 26 however contains a limitation on the jurisdiction of the Commission by providing that it may deal only with the matter not coming within the domestic jurisdiction of a State. In this connection Donnelly et. al case can be noted.

Donnelly et. al v. *The United Kingdom*, Collection of decision 122 (1973), decided by European Commission of Human Rights. It related to the serious allegation of brutality and torture in Northern Ireland which arose immediately following on August 9, 1971. The scope of Article 3 and 25 was discussed in length and it was said, "Neither Article 25, nor any other provisions in the convention *inter alia* Article 27(i) (a) prevent an individual applicant from raising before the Commission a complaint in respect of an alleged administrative practice in breach of the convention provided that he brings *prima facie* evidence of such a practice and of his being a victim of it."

(B) American Convention on Human Rights, 1969.—The convention declared that a man may enjoy the freedom free from fear and this object can be achieved only if every one may enjoy his economic, social and cultural rights as well as his civil and political rights and means of protecting those rights.

Convention has established two organs ; (1) The Inter-American Commission on Human Rights.

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(2) Inter-American Court on Human Rights.

(C) The Covenant on Civil and Political Rights, 1966.—The substantive provisions of covenant on civil and political rights is devoted or respected to the traditional civil and political rights provided in the Universal Declaration on Human Rights. Thus the covenant protects the right of life (Article 6); prohibits torture or cruel, inhuman or degrading treatment or punishment (Article 7), prohibits salavery, the slave trade and forced labour (Article 8), prohibit arbitrariness or detention (Article 9) and Articles 10 and 11 provides that no one would be deprived of their rights and liberty and shall be treated with humanity. The provision of the Covenant also provides rights of liberty of movement and freedom to leave any country even one's own country and no one shall be deprived of right to enter his own country.

Aliens will be equal before the courts and tribunals would provide guarantee in civil and criminal procedure. The covenant also prohibits arbitrary and unlawful interference with privacy, family and unlawful attack on honour and reputation. Article 18 and 19 provide freedom of thought, conscience and religion and freedom of expression and opinion. Article 20, prohibits the propoganda of war and any advocacy in the national affairs. This article also protect the child from his family.

CHAPTER XXIC

HIJACKING—INTERNATIONAL CRIMINAL LAW

Q. 118 What do you mean by Hijacking ? Discuss some of the recent air crashes.

Or

Hijacking is a new development in the field of International law. Discuss in details.

A. Meaning —Hijacking means unlawful seizure of air-crafts According to Dr. Sauri Shubber, hijacking, in its widest sense, is an act against the safety of civil aviation and resembles piracy. Article 1 of the Hague Convention of 1970 provides the following :—

"Any person who on board an aircraft in flight :—

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempt to perform any such act,

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commits an offence....."

Essentials.—Tokyo Convention 1963, provides following essentials of hijacking :

(1) The force or threat must have been unlawfully used or some sort of intimidation must have been used ;

(2) Such an act must be with a view to seizing the aircraft or exercising control over it ; and

(3) Such act must have been committed on board an aircraft in flight.

The Hague Convention of 1971 added that an accomplice of a person who performs or attempts to perform any such act.

Development of the law.—In order to fight with this menace of hijacking the Tokyo Convention was adopted in 1963 which, provides for the punishment of the hijackers. Despite of this Convention, there was no decline in the number of the incidents. India was also a party to this Convention. With a view to giving effect to the provisions of this Convention, India passed Tokyo Convention Act, 1975.

The Convention of 1963 could not solve the problem and the incidents of hijacking continued to increase. To deal with this problem, another Convention was passed in 1971 in Hague. This Convention provided for the deterrent punishment to the hijackers. It also provided that the offences shall be deemed to be included as extraditable offences.

Montreal Convention, 1971—Another Convention was adopted in September, 1971. This Convention was an improvement over the Hague Convention, as it widened the concept of offence of hijacking.

Hijacking of Indian Aircraft.—On January 30, 1971 an Indian Aircraft was hijacked and taken to Lahore. Pakistan Government instead of arresting the hijackers, has given them shelter. India demanded the hijackers but this demand was turned down by the Pakistan, in retaliation, India banned all flight of Pakistani aircrafts over Indian territory. Pakistan Government complained the International Civil Aviation Organisation against this ban. India's contention was that IOAC has no jurisdiction to hear the case. But this contention was rejected by the President of the Council. Afterwards Pakistan withdrew the case from the I. O. A. C. and subsequently Pakistani overflight over Indian territory were resumed.

In 1976, again another Indian aircraft was hijacked and taken

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treaty seems to indicate that ratification has regularity to retrospective effect.''

Q. 93. "The rebus sic stantibus doctrine is one of the enigamas of international law.' Discuss this statement, stating the precise, scope and application of this doctrine. (I.A.S. 1971).

A. Clasula Rebus Sic Stantibus.—According to the Roman Law every contract was subject to an implied condition *Rebus sic stantibus* (things remaining as they are). The effect of this implied condition was that a contract was binding provided the circumstances in which it was entered, remained the same. The rule that a contract lost its legal effect with the change of the circumstances was the corollary deduced from the aforesaid doctrine. In International Law, many writers supported the view that a treaty like a contract lost binding force on change of the circumstances. Some jurists held the view that only essential or vital change in the circumstances was enough to entitle a party to repudiate the treaty. Thus Professor *Hall* observes :

"A treaty, therefore, becomes voidable as soon as it is dangerous to the life or incompatible with the independence of a State, provided that its injurious effects are not intended by the two contracting parties at the time of its conclusion.

Mention may also be made in this connection of the other significant doctrine of International Law *Pacta Sunt Servanda*. The principle of *Pacta Sunt Servanda* which embodies a rule of natural justice requires that States after having consented to the terms of a treaty are legally bound to discharge these treaty obligations.

The position that emerged was that on the one hand the rule *Pacta Sunt Servanda* insisted upon the binding nature of the treaty and on the other hand the doctrine *Clasula rebus sic stantibus* allowed repudiation of a treaty on vital changes occurring in the circumstances.

The two doctrines were sought to be reconciled by an argument that although a State was bound by the treaty, it could be allowed to sacrifice its very existence at the altar of *Pacta Sunt Servanda*. The German writers of the nineteenth century amplified the scope of the doctrine *Clasula rebus sic stantibus* by laying down the rule that a State was not bound by treaty which was either in conflict with the right and welfare of its people or incompatible with the development of the State. Other writers took the same view and rule of *rebus sic stantibus* held the field. In 1870, Russia took advantage of this rule by declaring that it was not bound by a part of the Treaty of Paris of 1856 on the ground of material change of the circumstances. Commenting upon this Declaration, *Hall* writes :—

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...al form, for the instrument, in point of legal efficacy, is imper-...t without it."

According to Article 14 of Vienna Convention on the law of treaties, 1969, a State becomes bound by treaty when it ratifies it positively or it becomes bound by the treaty under the following circumstances :—

(1) When there is a provision in the treaty to this effect.

(2) When the parties express the view that the ratification is necessary.

(3) When the treaty is signed under the condition that the ratification is necessary.

(4) When the intention of ratification is evident from circumstances and talks during negotiations.

Judge, J. B. Moore in the *Mavrommatis Palestine Concessions* case says that the doctrine that treaties may be regarded as obsolete and lingers only as an each from the past'.

These judicial observations, however, apply with less force and cogency at the present time, when most of the currently registered treaties make no provision for ratification. According, to *Starke*, the practice of ratifications rests on the following rational grounds :—

(a) States are entitled to have an opportunity of re-examining and reviewing instruments signed by their delegates before undertaking the obligation therein specified.

(b) By reason of its sovereignty, a State is entitled to withdraw from participation in any treaty if it so desire.

(c) Often a treaty calls for amendments or adjustments in municipal law. The period between signature and ratification enables States to pass the necessary legislation or obtain the necessary parliamentary approvals, so that they may thereupon proceed to ratification.

(d) There is also the democratic principle that the Government should consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed sometimes public opinion may well disapprove it.

Ratification.—If retrospective.—The earlier writers held the view that ratification was retroactive in its effect and that the treaty came into force on the date when it had been signed. This rule, however, finds no support with modern writers. According to *Oppenheim*, "the rule that ratification imparts the binding force to a

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to Pakistan. This time, Pakistan Government arrested the hijacker and returned the passengers and aircraft to India. Pakistan assured India that deterrent action would be taken against the hijackers but subsequently released them on the ground that there is no sufficient evidence to justify their offence.

Two cases of hijacking took place in September 1981 and July 1984, yet another case of hijacking took place on 5th September 1986 when four armed terrorists seized a Pan American Jumboo jet with 399 Passengers and Cabin crew board at Karachi airport. Later on Pakistani Commandos engaged the four hijackers. In the terrible shoot out that ensued, 18 persons were killed and over a 100 injured. Indian Prime Minister blamed Pakistani authorities for killing. The U.K. press backed India's accusation. It was due to wrongful handling of the situation and blunder committed by Pakistani authorities that the Karachi tragedy occurred.

Proposal for the Establishment of an International Criminal Court —In 1970, Secretary-General of the U. N O. Thant proposed that the hijackers should be tried before an international tribunal, as it will protect the interest of all people and nations. According to Diederiks-Verschoor : "One of the reasons for the establishment of an international court is that sometimes it will be difficult for a national court to punish an international delinquent". He proposed that a special chamber in the I. O. A. C. must be created which must have jurisdiction over the hijackers.

INTERNATIONAL DEVELOPMENTS

Q. 119. Write a note on the following :—

(1) European Peace Treaty 1975.

(2) Indo-Bangladesh Accord of 1975.

(3) Indo-Pak Accord 1976.

(4) Nuclear Explosions Treaty 1976.

(5) Farakka Accord 1977.

(6) Treaty on Panama Canal 1977.

(7) U. N. Desertification Conference 1977.

(8) U. S. Israel Accord.

A. European Peace Treaty 1975 —The leaders of 35 nations, including the U. S , the Canada, Soviet Union, Britain and all other European countries assembled in Helsinki and signed European Peace Treaty on August 1, 1975. It ended the 30-year cold war

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between west and Soviet bloc. The signatories pledged not to use force to change their frontiers or to try to settle their bilateral disputes and pledged to improve East–West relations. Albania remained absent.

President Ford pledged that the U. S. would spare no effort to ease tensions and would devote to human rights and fundamental freedoms. Mr. Brezhnev, President of U. S. S. R. was also opposed to any outside interference in the internal affairs of States. "No one should try to dictate to other peoples on the basis of foreign policy considerations of one kind or another, and the manner in which they ought to manage their internal affairs. It is only the people of each State, and no one else, that have the sovereign right to resolve its internal affairs".

The Helsinki declaration is divided into four sections called 'baskets', containing political principles of security, co-operation in economics, science, technology and human affairs.

The first section consists of 10 principles which should govern relation among participating countries. These principles are as follows ;—

(a) Sovereign equality for rights inherent in sovereignty.

(b) Refraining from the threat or use of force.

(c) Inviolability of frontiers.

(d) Territorial integrity of States.

(e) Peaceful settlement of disputes.

(f) Non-intervention in internal affairs.

(g) Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, relegion or belief.

(h) Equal rights and self-determination of peoples.

(i) Co-operation among States.

(j) Fulfilment in good faith of obligations under International law.

Under the first principle on 'sovereign equality,' it is provided, that the frontiers can be changed in good faith in accordance with the international law by peaceful means and by agreement.

In addition to the principles, the first section provides for convening of a conference to draw up a treaty on the peaceful settlement of disputes.

The first section also calls for each signatory to voluntarily

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notify others of military manoeuvres involving more than 25,000 ground, air and naval forces.

The second section titled "Co-operation in the field of economics, of science and technology and of the environment" provides that the signatories will endeavour to reduce or progressively eliminate all kinds of obstacles to the development of trade and will foster a steady growth of trade while avoiding as far as possible abrupt fluctuations in their trade. It is also pledged that they will further take measures aimed at improving the working conditions of representatives of foreign organisations, enterprises, firms and banks concerned with external trade.

The next section titled "Questions relating to security and Co-operation in the Mediterranean", provides that they are conscious of the geographical, historical, cultural, economic and political aspects of their relationship with the non participating Mediterranean States.

The next section titled "Co-operation in humanitarian and other fields", has provided that their aim is to facilitate free movement and contracts, individually and collectively whether privately or officially, among persons, institutions and organisations and to contribute to the solution of the humanitarian problems that arise in that connection.

Significance of the Treaty.—The result of the treaty may be summarised as under :

(1) End of the cold war in Europe.

(2) Europe will not dominate the rest of the world, but will co-operate with it in the development and other peaceful pursuits, including economic, scientific and technical contracts.

(3) States with different social systems, which fought jointly against fascism, will work together without fear or conflicts.

(4) It will reduce military expenditure and will direct resources to the development all over world. Not only peace will be strengthened but co-operation and reform would become easier and smoother.

If the Helsinki Treaty is implemented in the right spirit, it would confer great benefit on the people of Europe and also of the world.

The signatories reviewed the treaty in October, 1977. President Tito of Yugoslavia said that a realistic programme for increased security and co-operation based on equality should be drawn.

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All the States should make efforts for the effective implementation of the programme.

(2) Indo-Bangladesh Accord.—The representatives of India and Bangladesh issued a joint statement on Dec. 8, 1975. They stressed that peace, stability and co-operation among the countries of the region are vital for the progress and well-being of the peoples. The Bangladesh delegation reaffirmed its Government's determination to maintain and strengthen the traditional ties of friendship and co-operation between the two countries and to continue its policy of ensuring the enjoyment of equal rights by all its people, irrespective of caste, creed or religion.

The Indian side re-stated its Government's firm desire for a peaceful border and a stable, strong and prosperous Bangladesh. Both States also stressed that peace, stability and co-operation among the countries of the region are vital for the progress and well-being of their people.

At the end of the talk, it was said that "common problems were discussed and mutually accepted solutions arrived at." The delegations expressed their "explicit desire to extend co-operation and assistance to prevent border incidents, smuggling and trans-border crimes."

(3) Indo-Pak Accords :—As a consequence of friendlly negotiations held between India and Pakistan from May 12 to 14, 1976 the following accords between India and Pakistan have taken place :—

(a) Appointment of Ambassadors.—India and Pakistan on June 21, 1976 named the Ambassadors for each other's country.

(b) Accords to Air Links.—India and Pakistan on June 17, 1977 signed a memorandum of understanding for resumption of overflights and restoration of air links between the two countries ; also signed a memorandum of understanding regarding the modalities of the discontinuance of the 1971 Pakistan case and the counter memorandum before the International Civil Aviation Organisation.

(c) Accord on Rail Links.—India and Pakistan have agreed to run an express train between Amritsar and Lahore daily. The decision was taken at a meeting of the Indian and Pakistan delegations on June 23, 1976 on working out modalities for resumption of rail traffic which was discontinued in 1975 at the time of hostilities between the two countries.

(d) Private trade.—Private trade between two countries will be resumed on July 15, 1976 after a lapse of more than 10 years.

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The Government of India on June 23, 1976 issued an order that partially modifies a notification of December 7, 1974, to allow private importors and exporters to trade with Pakistan subject to the policy, procedures, rules, orders and regulations as may be enforced from time to time.

(4) Nuclear Explosions Treaty, 1976.—Mr. Ford, the former President of America and Mr. Brezhnev, the former Chairman of the Soviet Communist party signed on May 28, 1976 a treaty limiting the size of nuclear tests for peaceful purposes. The treaty was signed by these two countries' seretary but the formal signing was postponed for some time, (ceremony had to be postponed by President Ford due to the internal politics of U. S A. President Ford feared that his political rivals may be able to exploit the treaty for election purposes).

Ambassador Walter Stoessel of the U. S. A. had announced on April 7 that the U. S. and the Soviet Union had agreed on a draft for a test Ban Treaty, which would limit peaceful nuclear devices to a mixmum power equivalent to 1,50,000 tons of TNT and which allowed on site inspection by both sides. Previously no side was willing to give concession of inspection of sites and this was a hurdle in the signing of the treaty. Under the guise of the ban, both powers had been building up even those weapons which are restricted by this treaty.

President Ford while signing the treaty remarked that "it is a milestone in the history of abuse control agreements". For the first time it provides for the co-operation for site inspection and observation in monitoring underground nuclear explosions. Under the treaty, the Soviet will allow American observers to witness test on the territory. The same concession is also given by America to the Soviet Russia.

Result : A real progress has been made in the field of arm control. A significant step has been taken towards a more stable, peaceful world States and towards a more constructive relationship between the United States and the Soviet Union. This treaty together with the Threshold Test Ban Treaty, will govern the conduct of every underground nuclear explosion for military or peaceful purposes for both parties. The two treaties impose the same limit of 150 kilotons on all nuclear explosions.

(5) Farakka Accord.—The purpose of constructing the Farakka Barrage over Bhagirathi river is to use about 40,900 cusecs of water out of the quantity stored in the dam to feed the Calcutta port which has been getting silted up as a result of the sediment deposit at the mouth of Hooghly. Following the Indo-Bangladesh accord of 1975, the waters of Ganga were discharged into the channels.

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Formerly, there was a dispute over the sharing of the profits. After the murder of Sheikh Mujibur Rahman, the Bangladesh Government has been raising various objections against this sharing of water.

The representatives of India and Bangladesh met in Dacca on November 5, 1977 and signed the agreement which ended 25 years old issue between these two countries. Mr. Surjit Singh Barnala, India's Minister for Agriculture and Irrigation, and Admiral M. H. Khan, member of the Bangladesh President's Council signed on behalf of their respective Governments. Both the Countries agreed on the sharing of the waters during the five lean months of the year between January 1 and May 31. The agreement shall remain in force for five years and also provides that it shall be reviewed after three years and six months, thereafter. A joint Commission shall be appointed to see the implementation of the agreement and sort out problems and disputes.

The agreement provides for withdrawal by India and Bangladesh during the leanest period from April 3, to April 30 at the rate of 208,000 cusecs and 34,700 cusecs working out to 37.5% and 62.5% respectively of the minimum flow of the Ganga and Farakka in the lean season of 55,500 cusecs. After the leanest ten-day period, India's share will increase at much faster rate to get as close to 40,000 cusecs as quickly as possible within the lean session. The rate of withdrawal by India during these period will increase from 2 to 2.5%.

Another important feature is that India will be able to draw small quantities of water for local use below Farakka too.

This accord had satisfied Bangladesh and may well become the starting point of a new phase of mutual understanding between the people of India and Bangladesh. The two Governments have undertaken to select a scheme based on the study and launch necessary measures to implement it as possible. Any extension beyond five years will depend upon the progress of implementation of the long-term proposals.

This treaty will boil down to the Bangladesh proposal for storage up stream for withdrawal during the lean season and the Indian proposal for linking the Brahmputra with the Ganga to augment the flow throughout the year.

(6) Treaty on Panama Canal :—The Governments of U. S. A. and the Panama signed an agreement on August 10, 1977. Since long the agreement was stalled as a result of the U.S. Government's reluctance to give up its century-old rights in the Canal area, under this agreement the Panama Canal and the Central Zone Area to the Government of Panama by the year 2,000. During this period the

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legal experts will work out the details in order to translate the basic elements into formal treaties.

When the treaty comes into effect, the U. S. area scale down its military presence in the Canal Zone and will reduce the present 14 installations to three and operate these jointly with the Panama National Guards till December 31, 1999. But Panama has accepted the indefinite role of the U. S. A. in defending the Canal after the expiry of the treaty.

American Conservatives regard this treaty as "a surrender of U. S. interests". A "Caribbean Summit" meeting ended at Bogota on August 7 with the formation of a fund to stabilise coffee prices and a series of policy statements on the Panama Canal, the future of Belize non-proliferation and the international economic order.

7. **U. N. Desertification Conference** :—The U. N. Desertification Conference ended in Nairobi on September 10, 1977. It adopted a plan of action to halt the March off man-made deserts by the end of the century. It was also proposed that a joint consultative group to generate resources for the implementation of the plan of action. It attempted to ameliorate conditions of both the human and live stock population in arid zones and to develop measures to improve land productivity. At national level both long-term and short-term measures should be taken to arrest the desertification process which affects nearly 30% of the global and over 700 million people.

The U. N. Committee, Chairman, Dr. M. S. Swaminathan said that the plan should involve appropriate technology, the necessary resources follow up and public policies which would generate social and administrative infra-structure essential for translating plans into field accomplishment.

The Conference encountered rough weather when the question of funds for the plan came up for discussion. Most of the countries were unwilling about-committing themselves when a proposal for the establishment of a joint consultative group to generate resources was taken up. The U. S. A. and Germany said that its nature should be temporary and advisory.

In the Conference the emphasis was put on the human aspects of the problem. The members expressed their concern over the impact of mass destruction weapons on ecological system. It also condemned the use of chemical and biological weapons which led to the desertification. It condemned the use of poisons in water during war and appealed to all U. N. members-States to refrain from using or supplying arms or chemical products for military use that have a detrimental effect on environment.

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(8) U. S.—Israel Accord on West Asia.—After a high-level diplomacy and repeated rounds of talks in Washington and Tel-Aviv an understanding has been reached between the U. S. A. and Israel on the question of resolving the West-Asia deadlock. Isreal was opposed to any negotiations with the Palestine Liberation Organisation and to the setting up of a separate Palestinian State betwten Israel and Jordan. It shows that he refused to yield on certain basic points.

Israel got an assurance from the United States that the acceptance of the joint U. S. Soviet Statement of October would not serve as the basis of Geneva peace talks and that the negotiations must be founded on the United Nations resolution. The Soviet statement had affirmed the legitimate rights of the Palestinean people and not mentioned the two U. N. resolutions which implied recognition of Israel's existence.

President Colter while addressing members of the Democratic National Committee,said that the joint Soviet-American communique on the Middle East was an "achievement of unprecedented significance". He reiterated that his policy would be fair-play for all parties. "I have got to be fair and I will be fair. I never tell the leaders of one nation one thing and the leaders of another nation another thing". He pointed out that the USSR had not insisted on mentioning the Palestine Liberation Organisation in the joint statement.

Israel made it clear that it would not let the Palestinean Liberation Organisation appoint a non-member Palestinean to represent it at the Middle East talks.

Q. 156. Write a note on the following :—

(1) Palestinian Problem.
(2) Apartheid.
(3) International Terrorism.
(4) Creation of Nuclear Weapon-Free Zone in South Asia.
(5) U. N. Conference on the Law of the Sea.
(6) Disarmament Conference.
(7) Farakka issue.
(8) New U. N. Organisation.
(9) Problem of Nambia.
(10) Military Base of Diego-Garcia.
(11) Vietnam's admission to the U. N.
(12) Afghan issue.
(13) The Iranian Issue.

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(14) The Kampuchean Issue.

(15) Falkland Issue.

(16) American Intervention in Nicargua.

(17) The Problem of Future of Hongkong.

(18) The Problem of Tamil of Indian Nationality in Sri Lanka.

(19) American Intervention in Grenada.

(20) Vienna Convention on State Property, Archives and Debts.

(21) U S. attack on Libiya.

(22) Accident at Soviet Nuclear plant at Chernobyl.

(23) Star Wars and International Law.

(24) Star Peace Plan.

(25) Delhi Declaratiou (1986).

(26) Closure of obsorver mission of P. L. O. New York.

(27) U. S attack on Libyan Jet.

(28) Action of Govt. of India in relation to Tamil Problem in Sri Lanka.

Ans. (1) Palestinian Problem :—

On April 2, 1947, the Palestinian requested the Secretary-General to convene Special Session of General Assembly to create and instruct a special committee to prepare recommendations for the future government of the Palestine. Consequently, the General Assembly appointed a committee to investigate any question relevant to the Palestinian problem. This committee recommended the partition of Palestine with economic union and minority plan for a federal State. The General Assembly adopted the plan for partition of Palestine with economic union, and an international area of Jerusalem.

The Arabs opposed this plan. The U S. supported the plan for partition up to March, 1948. Afterwards the U S. representative in the Security Council asked the Council to instruct the Palestine Commission to suspend its efforts to implement the partition plan and urged the Council to establish trusteeship for Palestine. The General Assembly did not accept this plan and established the office for United Nations Mediator for Palestine.

The emergence of the new State of Israel, led to the violent Arab reactions and the renewed hostilities in Palestine. On December 11, 1948, the General Assembly decided to establish a Conciliation Commission.

On July 26, 1956, Egypt nationalised the Suez Canal Company, Israeli forces launched an attack across the Sinai Peninsula. The

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General Assembly called for an immediate cessation of war and sent United Nations Emergency Forces to supervise truce. U.N.E.F.'s operations were terminated in May 1967, at the insistence of President Nasser of Egypt. It has been rightly observed, "The policy of Arab confrontation with Israel produced situation wherein Palestinian objective assumed the character of ultimate goal, while seemingly more immediate like cease fire, disengagement and Israel's withdrawal from occupied lands received urgent attention from West Asian peace makers". In 1964, the Palestine Liberation Organisation was established. In 1974, it was recognised as the Chief Spokesman for the Palestinians.

Recently the P.L.O. has changed its stand by stating that the movement goals should be a Palestinian State on the West Bank of the Jordan and in the Gaza Strip. Israel had never recognised the P.L O. The P L O. was given the right of participation on all matters concerning West Asia. Now Israel has softened its attitude and accepted the idea of Palestinian State by demanding racognition from the P L.O. as a pre-condition for reconvening the Geneva Middle East talks, The U S. attitude has also been changed in favour of Palestinian issue. President Carter on May 13, 1977 said that there can be no peace in the West Asia until the Palestinians were given a homeland On July 22, 1977, the P.L.O. has been admitted as a non-State member to the U.N. body. Other organs of the U.N. also admitted P.L.O.

But the main obstacle in the early solution of the Palestinian problem is the refusal by the Israel to negotiate with P L.O. The P.L.O. does consider itself at war with Israel —a guerilla war—because that is the only kind it can fight. Arafat said that the only solution was for a Palestinian State and Israel to live under the joint guarantee of the United States of America and the Soviet Union.

While explaining India's view on the report of committee on the exercise of Inalienable Rights of Palestinian People, Mr. Vir Bahadur Singh, Member of Indian delegation told the General Assembly on 18th November, 1976 that the Palestinian was a creation of U.N. as such the responsibility for solving it rested with squarely.

The General Assembly and Security Council should give full consideration to the recommendations of the committee on the Palestine and take them into account in resolving the Middle East problem. In a resolution on 7th December, 1978, the General Assembly also reaffirmed that a just and lasting peace in Middle East could not be established without the achievement of a just solution of the problem of Palestine.

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(2) Apartheid—an International Crime. (C.S.E. 1990).

Many resolutions have been passed by the General Assembly condemning apartheid. On November 30, 1973, the International Convention on the suppression and punishment of the crime of apartheid was adopted by the General Assembly. The participating States declared that apartheid is a crime against humanity. Inhuman acts results from the policies and practices of apartheid are crimes violating the purpose and principles of the Charter of the United Nations. The organisation and institutions, which practice apartheid were declared criminals. Abetment, incitement or conspiracy in the commission of the crime of apartheid, is also declared an international crime.

The Anti-Apartheid World Conference was held in Lagos (Nigeria) from 22 to 26 August 1977. It condemned the apartheid and racism in all its forms. The South Africa has been denying world opinion. All sorts of sanctions were imposed on it but proved ineffective On October 31, 1977 demanded sanctions and other stringent measures against South Africa.

(3) International Terrorism (C.S.E. 1989).

The problem of international terrorism has increased recently. Thus the thoughts were given many times to control it. The problem was first time taken up by the 27th Session of the General Assembly, the International Law Commission also submitted its report in the same session of the Assembly. The report noted that the over all problem of terrorism throughout the world was of great complexity but that there could be no question as to the need to reduce the Commission of terrorists acts even if they could never be completely eliminated.

In the 31st Session of the General Assembly a resolution was adopted which expressed deep concern over increasing acts of International terrorism. It entrusted to the *ad hoc* committee on International terrorism to continue its work in accordance with the mandate of the resolution. The Committee submitted its report to the General Assembly in March, 1977 which stated that the debate has revealed that its members shared the concern of the international community at the development of the international terrorism.

The incident of hijacking of West German air-liner with 86 passengers abroad on October 13, 1977, compelled the General Assembly to put "safety of International Aviation" to the agenda of the 32nd Session of General Assembly as a matter of urgent and important character have further highlighted the urgency ot problem and the need to evolve adequate legal controls over acts of international terrorism.

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Thirty Eighth Session (1984)of the General Assembly was marked by the commitment of member nations to eliminate the cause underlying international terrorism. For this efforts by the members unilatarally and with the co-operation of other States as well as relevant U.N. organs. In this resolution (38/130) all member-States were called upon to fulfil their obligations under International Law to refrain from organising, instigating, assisting or participating in acts of terrorist acts in another State or acquiescing in organized activities within their territory directed towards commission of such acts.

In 1986 (ICAO) International Civil Aviation Organisation and (SAARC) South Asian Association for Regional Co-operation—repeated commitment to curb the problem of international terrorism. But summit (SAARC) of Delhi failed to define the term international terrorism.

SAARC member nations namely Bangla Desh, India, Sri Lanka, Nepal, Pakistan, Maldiv, Bhutan adopted SAARC Regional Convention on Suppression of Terrorism (4th Nov. 1987). According to the contents of the convention conduct constituting international terrorism as defined under Article I of the convention shall not be regarded as political offence for the purpose of extradition.

By this convention existing extradition treaties are modified to the extent between he contracting States. However the contracting States may refuse to extradite where the matter is of trivial nature.

(4) Creation of Nuclear-Weapon—Free Zone in South Asia :—

Some countries led by Pakistan put before the General Assembly a resolution on the question of the creation of Nuclear-Weapon-Free-Zone in South Asia. The Indian representative told before the First Committee on 14th November, 1974 that India supports the creation of Nuclear-Weapon-Free-Zone in appropriate regions of the world through consultations and agreement among concerned States. India and Pakistan prepared a draft resolution which was adopted by the General Assembly. India reiterated that the negotiation should be on a regional basis free from any foreign interference. At present the primary task before the Indian Ocean States is to unify their efforts to remove the foreign presence in the area, and struggle to create a peace there.

This question again came before the plenary session of the General Assembly. A Pakistani resolution was adopted by the General Assembly on December 12, 1977. The resolution asked all the States of South Asia to make efforts to establish the Nuclear-Weapon-Free-Zone. India reiterated that it will not support the move unilaterally brought up by Pakistan.

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Thus, India is not against the creation of Nuclear-Weapon-Free-Zone as such but wants that proposal for such zone should be developed and matured among the interested States, in the region concerned.

(5) U. N. Conference on the Law of the Sea :

The Third Session of the U. N. Conference on the law of sea was held from 17 March to 10 May, 1975. It requested its three main Committees to prepare a single negotiating text covering the law of the sea. Each committee prepared an informal Single Negotiating Text.

Text of the First Committee —It dealt with the seabed and ocean floor and the sub-soil thereof. It provides for the establishment of an International Seabed Authority which may have regional centres or offices. Through this Authority, States shall administer the area, manage its resources and control the activities of the area in accordance with the provisions of the conventions.

The Authority may within the limits determine, carry out activities in the area or any stage thereof through States parties to the convention, or State enterprises, or persons natural or judicial which possess the nationality of such State or are effectively controlled by them or their nationals, or any group of foregoing, by entering into service contracts or joint ventures or any other such form of association which ensures this direct and effective control at all time over such activities. The Conference provides for the establishment of the five organs of the authority—Assembly, Council, Tribunal, Enterprise and Secretariat.

Text of the Second Committee —It dealt with the topic of the territorial sea and the continuous zone, straits used for International Navigation. The exclusive economic zone, the continental shelf—the high seas, the land-locked States, the Arcoupagic States, enclosed and semi-enclosed seas and territories under foreign occupation or colonial domination.

Text of the Third Committee —It dealt with the protection and preservation of the Marine environment. It provided that the States have right to use natural resources and it is their duty to protect and preserve the marine environment taking into account their economic needs and their programmes for economic development. The authority is entrusted with the enforcement of the rules and standards adopted in accordance with the provisions of the convention for the protection and preservation of the marine environment.

Fourth Session of the U. N. Conf rence.—This session began on 15 March, 1976. This session considered the negotiating text

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of these committees. It presented a revised four-part negotiating text.

The first part lays down the principles for the implementation of the basic concept that the resources of the international sea-bed area beyond the limits of national jurisdiction are a "common heritage of mankind". It also empowered the International Sea Bed Authority to exploit the ocean bottom from its mineral wealth. A tribunal was also proposed to be established for the settlement of the disputes over sea-bed resources.

The second part of the text provides for the rights and duties of States in a 12-mile territorial sea a contiguous zone extending up to 24 miles from shore, a 200 miles exclusive economic zone and the high seas. The concept of the economic zone has given coastal States rights over the fish and other living resources and reserving the right of navigation to all States. The land-locked States shall also have the rights to fish in the economic zone of neighbouring States, subject to the bilateral agreements.

The third part of the text lays down that the States are allowed to conduct researches in the economic zone subject to the consent of coastal States.

The fourth part proposed a system of compulsory settlement of disputes. The reference may be made to the Tribunal, as well as to the International Court of Justice, arbitration tribunal, conciliation and a new type of committee for handling technical disputes over fisheries, pollutions, scientific-research and navigation. This part of the text is in a some what different position from the other parts, in that, it has not yet been discussed even in an article by an organ of the conference.

Fifth Session of the U. N. Conference —The fifth session which was started from August 2 to September 17 of 1976, very limited progress was made during these negotiations.

Sixth Session of the U. N. Conference —It started from May 23 to July 15 of 1977. It considered a new revised composite text. It contains many changes.

Changes contained in the informal Composite Text —According to this text, dead sea mining would be permitted to supply up to 100 percent of the annual rise in the world total demand for nickel for the first seven years up to 60 percent. Each State should contribute funds equal to its United Nations budget contributions in order to secure loan from the enterprise. It should be reviewed after 20 years and the effective participation of developing countries in the activities in the area should be promoted, having due regards

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to their needs and interest But the interest and needs of the land-locked States should be kept in mind.

Seventh Session of the U. N. Conference.—It began from March, 1978. The Conference attempted to evolve an international treaty on sharing the world's oil minerals and other wealth in the oceans. It also included other matters such as innocent passage and the territorial sea, and developments of major importance, such as, the proposed 200-mile exclusive economic zone.

Eighth Session of the Third U. N. Conference—On the Law of Sea (From 19 March to 27th April, 1979)—Like the two previous Sessions the eighth session was also mainly devoted to different aspects of the proposed International Sea-bed Authority but no significant progress could be made.

(6) Disarmament Conference :

This is a very complicated problem. Many efforts have been made to limit the armament. The first step towards it was taken by the United Nations by establishing U. N. Atomic Energy Commission in 1946. The next important step was the establishment of the Disarmament Commission in 1952. In 1970, the United Nations declared 1970 to 1980 as a decade of disarmament. In March, 1970, the Treaty on the Non Proliferation of Nuclear Weapons was drawn. But India did not sign it as its provisions were not applicable to big five.

On February 11, 1971, a Sea-Bed Treaty was concluded and it was ratified by 30 nations. It came into force in 1972. This treaty prohibited the fixation of weapons on the sea-bed. Another important step which U. S. A. and U. S. S. R. took was the conclusion of the Strategic Arms Limitations Talks in 1976. It lifted defensive Anti-Balastic Missiles sites in each country. It permitted both countries to replace existing offence nuclear missiles, whether placed on land or a board at sea with more sophisticated weapons.

The first review conference of the parties to the treaty on the Non-Proliferation of nuclear weapons concluded on 30th May, 1975. It prohibited transactions of nuclear weapons and their technology from nuclear weapons to non-nucler weapon States. It banned all the nuclear tests. It expressed its strong support to the I A. E. A. for safeguards aimed at preventing the diversion of nuclear energy from peaceful uses to explosive devices.

The General Assembly on Dec. 11, 1975 passed a resolution prohibiting new weapons of mass destruction, nuclear tests, chemical weapons, etc. But all these efforrs paid no fruit.

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In 1977, some progress was made towards reaching a big powers agreement on nuclear weapons. The Soviet Union proposed an international agreement on a simultaneous halt in the production of the nuclear weapons by all countries. President Carter in his address to the U. N. General Assembly on October 4, 1977 called for "full scope and comprehensive safeguards" to prevent nuclear proliferation.

The U.S. State Department on January 12, 1978 made public an agreement which was concluded at a secret meeting of the 15 countries known as the "Suppliers Group" It provides that the signatories will apply a list of safeguards in all sales of nuclear technology, especially the export of reactors, enrichment plants, and in all materials such as enriched uranium, to be used to manufacture nuclear weapons. The vital safeguard clauses include the following :—

(1) The suppliers will not contribute to the production of the weapons.

(2) The buyers and sellers will lay out all necessary means of preventing the theft of fuel or nuclear material.

(3) The third supplier countries will not intervene in the event of the disagreement in negotiations on a contract to make their own offer.

(4) Suppliers will sell nuclear materials only to those States which have pledged to accept international safeguards.

(5) The buyer must agree to respect all international safeguards in the event of the re-sale of illustrations to third countries.

Thus it has been rightly remarked, 'International relations cannot be stable so long as the arms race continues. Hence in the present conditions, no other way of strengthening International security and ensuring peace is more reliable than disarmament. It is a problem that bears on the interests of all States, big and small. In view of this, it is the U N , where the overwhelming majority of the world are represented that must give a fresh impetus in accelerating the solution of the whole complex of problem connected with disarmament. It may however be noted, "That five powers have a special responsibility for maintaining world security and success of nuclear disarmament depends above all of them."

The U.N. Conference on Desertification ended in Nairobi on September 10, 1977 after adopting an integraded plan of action to halt the march of man-made desert by the time of the current century. It proposed the establishment of the Joint Consultative Group to generate resources for implementing the plan of action.

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The plan attempts to ameliorate conditions of both the human and livestock populations in arid zones and to develop measures to improve land productivity. It outlined both short-term and long-term measures to be taken at national levels to arrest the desertification process.

The Conference condemned the use of chemical and biological weapons which led the desertification. Effects of these weapons are most seriously felt in the developing countries.

This Conference could not make any headway as major donor countries were hesitant about committing themselves when a personal for the establishment of a joint consultative group to generate the resources was taken up.

(7) Farakka issue :

The river Ganga passes through both India and Bangladesh over which India has built Farrakka Barrage in order to save Calcutta port. Bangladesh demanded uninterrupted flow of Ganga waters all over the year and insisted that India should take prior permission before utilizing or diverting any Ganga waters in its own territory. The matter was referred by Bangladesh Government to the General Assembly. India opposed the internationalization of this issue. India's stand was that it must be settled bilaterally and its reference to the United Nations would delay the solution on the issue. Consequently, both countries agreed to discuss the issue on December 6, 1976 at Dacca. This talk ended in deadlock.

A significant headway was made by the delegation of two States during the talk held in at Dacca in April, 1977. Since then several rounds of talks were held between the two delegations both at Delhi and Dacca. Finally, India and Bangladesh signed a comprehensive short and long term agreement on September 30, 1977.

During the five months of the loan season the flow in the Ganga is estimated at between 55,000 cusecs and 98,000 cusecs the lowest being the flow in leanest period of April 20 to 30 and the highest during the first 10-days of January. From 55,000 cusecs during April 21 to 30, the flow increases to 65,000 cusecs during the last 10 days period January to May. India will then get 26,750 cusecs and Bangladesh 38,750 cusecs. The allocation of the water from January to May has been fixed on the basis of 75% availability calculated from the recorded flows of the Ganga from 1948 to 1973. India will be entitled to use upto 200 cusecs below the Farrakka Barrage for "reasonable" purposes.

(8) New U. N. Organisation :

The United Nation's newest agency—International Fund for

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Agricultural Development has come into existence with the help of the world's oil producing nations which have promised to donate large sums of money to keep it going for the good of the poor countries of the world. It is the first organisation designed to implement the new International Economic Order in a real way. The oil-producing nations will continue their contributions to new Fund as long as their contribution is matched to the equal voting rights.

The target of the Fund is one billion dollars to be spent over a three–year period, before further relinquishments are arranged for projects designed to increase food production, create employment and eliminate malnutrition among the poorest of the world's poor. It was agrred that the IFAD would come into operation when pledge of 750 million dollars had been ratified by six countries from Category I, six countries from Category II and 24 from Category III. Industrialised nations promised 571 million dollars. OPEC 435 million dollars, equal with the developing countries promising only 10 million. Each category will have voting rights in running of the organisation.

(9) Problem of Nambia :

South West Africa (Nambia) was under the control of the South Africa. As soon as League of Nations dissolved, its administration was handed over by South Africa to trusteeship system. After few years South Africa adopted a defiant attitude and contended that after the dissolution of the League of Nations, Nambia has become integral part of South Africa and Trusteeship could not exercise control over it. The General Assembly referred the matter to International Court of Justice for its advisory opinion. The Court ruled that even under League of Nations, the Nambia had been conferred international status which could not be altered or modified unilaterally by South Africa. The South Africa was bound to submit its control and supervision to the trusteeship.

Despite of this decision, the South Africa was defying all resolutions, directives of the General Assembly and Security Council. The Security Council in 1970 passed a resolution against South Africa. This resolution was also disregarded ; consequently the International Court of Justice was again asked to give its advisory opinion The court held that the continued presence of South Africa in Nambia is illegal and it should withdraw its control.

The decision was again defied by South Africa. The Security Council in 1977 passed a resolution calling upon all States to cease supplying arms and related materials to South Africa. This was the first time that the Council imposed an arms embargo on any State. South Africa again defied U.N. resolution and Prime Minister

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Mr. John Vorster said that Africa had "outguessed" the U.N. and made itself sufficient in arms long before the U. N. embargo.

President Carter on April 4, 1978 said that there should be a move towards an internationally acceptable arrangement for black majority rule in Nambia and for this purpose the election in the territory must be held under the supervision of United Nations.

An agreement to hold a new talk on Nambia was reported on May 3, 1978, between the South West Africa People's Organisation and five Western Countries in order to prepare a plan to bring the territory independence from South Africa by the end of 1978. Diplomats from among the U.S.A., Canada, Britain, France and West Germany said the meeting had dealt only with 'procedure'. Earlier Gen, Obasanjo, head of the State of Nigeria, said that Pretoria Government is planning to hold elections leading to independence in the territory without United Nations supervision and without the participation of SWAPO.

Namibia—Its emergence as an independent State.—Before Namibia could have adopted the status of an independent State the General Assembly played a vital role in that direction. In 35th Session (2nd March 1981) delegation of South Africa was debarred from attending the session. On 6th March 1981, the General Assembly vehemently condemned South Africa for its continued illegal occupation of the territory of Namibia. To put pressure on the Government of South Africa a decision to impose comprehensive mandatory sanction against erring Government was taken.

29th April 1983 is a significant day in the process of independence of Namibia as on that day Paris declaration was adopted. In this conference, the inalienable right of the people of Namibia to self-determination and national independence in a united Namibia in accordance with the purposes and principles of the charter of the United Nations was affirmed. To draw the attention of international community 26th Aug. was declared to be celeberated as Namibia day.

In 1988 on 14th day of July the United States, Angola, South Africa and Cuba reached an agreement to free Namibia. This decision was likely to free Namibia from 73 years of South African rule As a result of this decision Cuban troops posted in Namibia were to be withdrawn. The U.S. acted as mediator and 1990 was fixed as the year of final independnce.

Further developments.—14th December 1989—Protocol on the independence of Namibia signed at the capital of Congo, Braziville. It was 1 phase. The Second Phase began on 22nd May 1989, and the third Phase began in Nov 1989.

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In an election SWAPO emerged victorious. Mr. Sam Nujoma lead his party with the motto of mixed economy.

On the Midnight of 21st March 1990 Namibia attained independence.

First session of U N. Council on Namibia was held in the capital of Namibia Windhock (9 to 11 April 1990).

(10) Military Base of Diego Garcia :

For a very long time Britain had control over the Diego Garcia. After some years Britain withdrew its base from this island due to some economic difficulties. Soon after the big powers filled this vacuum. The United States wanted to have control over it due to her interest in the security of Southern Asia. The U. S. thought that if it is not done, the Soviet influence over Indian Ocean will increase. In view of these considerations the United States is determined to build a military base on the Island of Diego Garcia in agreement with Britain to whom the Island belongs.

This move was strongly resisted by littoral States of the Indian Ocean as they were afraid to the great powers conflict in the area. The building of military base at Diego Garcia is contrary not only to the letter and spirit of the General Assembly resolution but also to the World opinion particularly among littoral and hinterland States of the Indian Ocean. Besides raising other objections to the building of Naval base at Diego Garcia by the U. S., the littoral and hinterland States of the Indian Ocean should raise the issue of eviction, deportation or uprooting of the Diego Garcians which constitutes a flagrant violation of human rights.

(11) Vietnam's admission to the U. N. :

On September 20, 1977, Vietnam was admitted as a member of the United Nations by the General Assembly. Their admission raised the membership to 149. Her admission was long due but the United States of America was constantly opposing this move and always vetoed the resolution for the admission of Vietnam in the Security Council. The vetoes could not be justified on any juridical grounds and were motivated by political grounds. It was a clear abuse of which the Charter confers upon a permanent member of Security Council of U. N. Vietnam's admission became possible because after the assumption of the office of President by Jimmy Carter.

(12) Afghan Issue :

Afganistan is a mountaineous country surrounded by Soviet Union in the North, by a narrow strip of Chinese territory in the North-East, by Iran in the West and by Pakistan in the South and

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South-East. The present Afghan issue is directly related to the April, 1978 military coup in which President Mohammed Daoud was overthrown and killed, which paved the way for the establishment of a new government under Noor Mohammad Taraki. The installation of this revolutionary Government caused serious concern in the U. S. also and it encouraged and supported the Anti-Taraki elements mainly through Iran and Pakistan. Reactionary elements in the U. S. requested the Carter Administration to the measures through Iran and China to Counter the Afghan shift towards Soviet Russia. So far as India was concerned she sincerely wished that the new Afghan Government was spared of the trauma of an armed conflict, for in that case, she would also be affected directly and indirectly.

In December 1978, a treaty of friendship, goodneighbourliness and cooperation was signed between the Soviet Union and Afghanistan Under Article 4 of the Treaty, the Soviet Union agreed to come to the rescue of Afghanistan if it was involved in Armed conflict. It is said that the Soviet Union has high stakes in the success of the Revolution in Afghanistan.

There was a counter coup and people under the leadership of the Peoples Democratic Party headed by Babrak Karmal rose against Amin and put an end to tyrany. President Babrak Karmal has recently said that he requested Soviet military intervention in December, 1979, to prevent the U. S., China and Pakistan from dismembering his country. In an interview to a magazine he said that the invading forces of these countries, under the conspiracy to divide the territory of Afghanistan had based 50 camps in Pakistan territory close to Alganistan's South-Eastern border. Mr. Karmal further said to prevent the eruption of civil war and to safeguard Afghanistan's independence we asked the Soviet Union to dispatch limited military forces into Afghanistan.

The Afghan issue and the U. N.—On 6th January, 1980 at the request of 51 countries the Security Council of U. N. met and voted 13-2 in favour of a resolution which called for withdrawal of foreign troops from Afghanistan but the measure failed to win the approval of the Council because it was vetoed by the Soviet Union. After the failure of the Security Council to find a solution the matter was raised in U. N. General Assembly which adopted the resolution by 104 to 18 with 18 absenties including India. The resolution called for "the immediate", unconditional and total withdrawal of Soviet troops from Afghanistan to enable its people to decide their own future without outside intervention. The United Nations Human Rights Commission on 14 Feb., 1980 passed a resolution calling for world-wide withdrawal of recognition for the new regime in Afghanistan and urging all U. N. members to cut off any form of assistance to the regime until Soviet troops leave the country.

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Legal problems of the issue :

1. Whether Soviet Union is guilty of 'invasion' or intervention in the internal affairs of Afghanistan ?

2. Whether discussion of the Afghan issue in the Security Council and General Assembly amounts to intervention in domestic or internal affairs of Afghanistan.

3. Violation of Human Rights.

Conclusion.—It is clear from the above discussion that so long as the Soviet troops remain in Afghanistan at the request of the Government of Afghanistan and do not cross the territory of Afghanistan to attack any other sovereign State, the Soviet Union cannot be held guilty of invasion or intervention, Unless the Government of Afghanistan requests the Soviet Union to withdraw its forces from Afghanistan and Soviet Union turns it down, Soviet Union cannot be held guilty of intervention.

It is to be noted here that on 15th October 1986, Soviet Union started pulling out some of its military troops stationed in Afghanistan. This step was persuant to a declaration of Soviet leader Mikhail Gorbachov. (28th July 1986). The withdrawal of military troops was to be done in phased manner and before the end of 1986 all troops were withdrawn.

(11) The Iranian issue :

The present turmoil in Iran relates back to the beginning of 1978. The opposition to the uninterrupted rule of Shah of Iran gathered momentum slowly and gradually and it became so strong. by mid January, 1979 that the Shah had to leave his country. Ayatollah Khomeini, after the return of 15 years in exile emerged as the most influential and powerful leader of Iran in 1979. Shah of Iran left the country and took shelter in Panama. In January 1980, Iran sent a warrant to Panama for the arrest of the deposed Shah on charges of mass murder and embezzlement of State funds.

On 4th November 1979, several hundred Iranian students invaded the U.S. Embassy and seized a group of 50 hostages and asked the U.S. Government to extradite the Shah in exchange of the said hostages, who was undergoing medical treatment in U.S. at that time. The U.S. rejected the Iranian students demand and asked for the safe release of all the hostages.

The Iranian issue and the U.N.O.—In view of the Iran U S. conflict on 5th December, 1979, the Security Council unanimously adopted a resolution calling on the Iranian Government to release immediately U.S. Embassy staff held in Iran and assure their safe

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passage out of the country. The Security Council also urged the Government of Iran and the U.S. to exercise the utmost restraint in the prevailing situation. The Security Council gave the mandate to tackle the U.S. Iran confrontation. The U.S. mustered enough votes in Security Council for sweeping sanction against Iran but Soviet Union vetoed and its delegate said the detention of diplomats was against the international convention but it did not threat to international peace and security. A ray of hope was seen after the assuming of the office of the President by Banisadar but that too failed miserably.

Legal issues of the Problem—

(1) Whether seizure of diplomatic staff of American embassy in Tehran as hostages amount to violation of international law ?

(2) Is it proper to connect the issue of the release of hostages with the extradition of the deposed Shah ?

(3) Does holding of American hostages by Iran entitle to U.S. to attack Iran.

(4) Can Iran validly try the U.S. hostages for spying ?

The International Court of Justice gave its final judgment in the case on 24 May, 1980, the Court finally decided that the Government of Iran must immediately release every one of the United States diplomatic personnel and other United States nationals being held under lawful detention. The Court also unanimously decided that no member of the United States diplomatic or counsolar staff might be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness. In four further decisions taken by large majorities, the Court decided that Iran was violating obligations it owed to the United States under International conventions.

Conclusion.—It is clear from the above discussion that the Iran was guilty of flagrant violation of Vienna Conventions of 1961 and 1963. On the other hand, though aggrieved and victim of Iran's illegal acts and omissions, America exercised exceptional restrain and patience. It may be noted that Iran agreed to release the members of U S. Diplomatic and Counsolar, staff on the condition that America would return to Iran the money deposited by Shah of Iran in America. America accepted this condition and consequently the members of U.S. Diplomatic and Consolar staff held as hostages in Iran were released.

(14) Kampuchian issue ;

Through a telegram dated 31 December, 1978, the Government of Democratic Kampuchean (i.e. Combodia) drew the Security

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Council's attention to the serious threats to the peace, security, independence and stability in South East Asia and Asia which Vietnam and U.S.S.R. were creating by their aggression against Democratic Kampuchea. Thereafter, vide telegram of 3rd January 1979, Deputy Prime Minister, Ieng Sory stated that the Vietnam was intensifying its war of aggression against Democratic Kampuchea and requested an urgent meeting of the Security Council to condemn Vietnamese aggression and to take measures to ensure that it ceased its aggression and respected the independence, sovereignty and territorial integrity of Democratic Kampuchea. In response to these telegrams the Security Council considered the Kampuchean issue at five Council meetings.

In the Security Council, Prince Norodem Sihanouk said Kampuchea was the victim of a large scale act of flagrant aggression by Vietnam. Greatly encouraged by its multifarious alliances, in particular a *de facto* military alliance with the U.S.S.R Vietnam launched an all out attack for the conquest of Kampuchea. The National United Front for National Salvation of Kampuchea was created and had existed only since 2nd December, 1978. He added that the contention of the Vietnam that the war raging in Kampuchea or Cambodia was a civil war without any Vietnamese involvement was wrong. The war in Kampuchea, in fact, was a war of aggression unjustly unleashed by Vietnam against Kampuchea. Vietnam regretted that the Council has refused to hear the voice of the new revolutionary Government which was in command of the entire territory of the People's Republic of Kampuchea and recognised by many countries in the world. On 7th January, 1979, the revolutionary and popular forces of Kampuchea under the leadership of the National United Front for National Salvation of Kampuchea, overthrew the Pol Pot-Leng Sory Clique and took full control over the territory of Kampuchea. Thus, on 8 January, Peoples Revolutionary Council was created as the sole legitimate and lawful Government of Kampuchea.

Legal issues of the problem.—It is now generally agreed that the ousted Pol Pot Government was guilty of perpetrating brutal genocide against people of Kampuchea. It was also guilty of the human rights of Kampuchean people. Thus the Pol Pot Government was without shade of doubt, guilty of violation of the rules of international law. Intervention on the ground of violation of human rights or for protection of person and property of citizens is no more valid under the provisions of the Charter. It is the U.N. alone which is competent to take any action and even the U N. by the virtue of Article 2 (7) of the Charter, cannot intervene in the domestic affairs of any Member State unless the Security Council first determines under Article 39, that aggression has taken place or situation poses a threat or likely to pose a threat to international

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peace and security It may be noted here that Security Council could not take any action because of the veto exercised by U.S.S R.

Thus while Vietnam which sent about 100,000 Vietnamese troops to fight in Kampuchea was guilty of intervening in the affairs of Kampuchea, China was equally guilty of sending equal number of Chinese troops in Viet Nar. and thereby making illegal intervention in the affairs of the other State. There, is, however, no denying the fact that the Pol Pot regime was guilty of having perpetrated genocide and having violated human rights of the people of Kampuchea.

(15) Falkland Issue (1982)—The Government of Argentina announced on, 2nd April, 1982, that its armed forces had recovered Malvines Falkland, South Georgia, and South islands through a successful military operation. The Government, further added that the exercise of Argentina Sovereignty over all the island territory and the air and sea space has been assured. It may be noted here that Argentina has claimed these islands in the South Atlantic, South West of Argentina, since 1833 when they were ousted by British. On the other hand, the British policy has been that there can be no contemplation of any transfer of sovereignty without consulting the wishes of the House of Commons. Britain said, "The action of Argentina is an act of unprovoked aggression and we are taking appropriate military and diplomatic measures to secure our rights under international law.

On 2nd January, 1833 at Port Solided, British Captain John Janes Orslow, in command of the Corvettle "Clio" took the island by force, expelling the Argentina population and authorities residing in them. At that time war was considered as an attribute of sovereignty and not illegal one. Now, the U .N. Charter prohibits not only war, but also use of force for the settlement of international disputes.

On 4th April, 1982 the Security Council passed a resolution by 10 votes to 1 calling for immediate withdrawal of Argentine troops from the Falkland Islands and urged Argentina and Britain to seek diplomatic solution. The powerful Roval Navy of Britain blockaded the Falkland islands and on 20th April, 1982 British Helicopters carried out machine-gun on the port of Grytviken on the South Georgian islands. On 28 April, 1982 the defence Ministry of Britain declared total air and sea blockade around the Falkland islands and on 30th April, 1982 Britain declared the troubled waters as 'war zone'.

Argentina claims that Malvines (i. e. Falkland) Islands is a decolonization problem, a fact which has been accepted both by

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the U. N. and the Non-aligned countries. The 1976 Colombo summit of Heads of States of Non-aligned nations adopted the following decision—

> "The conference in the special issue concerning the Malvines Islands, firmly supports the just claim of the Argentina Republic concerning its sovereignty over the islands and urges the United Kingdom to actively continue the negotiations recommended by the United Nations with the purpose of returning the said territory to Argentina Sovereignty, thus putting an end to this illegal situation which still exists to the southern part of the American Continent."

But, Argentina's action in Falkland Island is a clear cut violation of Article 2 (a) of the U. N. Charter as it amounts to aggression.

(16) American Intervention in Nicaragua.—Nicaragua is a small country in Central America. Nicaragua has been fearing American Intervention for a considerably long period. In a letter to the President of Security Council on 22 March, 1983, Nicaragua requested, "in view of the grave increase in acts of aggression" against it; an urgent council meeting to analyse situation which endangers international peace. Nicaragua said that it was facing a new escalation of United States aggressive acts by way of massive infiltration of military units of Somoza Counter revolutionaries form Honduras. Between January and October 1982, counter revolutionaries training camps in Florida, Texas and California had played an important role in carrying out acts of war against Nicaragua. There were films and other concrete evidences to support these assertions. On September 13, 1983, Nicargua told the Security Council that attacks carried out on September 8 and 9, 1983, including incursions into Nicaraguan territory from Costa Rican and Honduran air space that the nature and scope of that aggression revealed that United States assistance to Somozist and mercenary groups was increasing progressively.

On 11 November 1983, the General Assembly adopted a consensus revolution condemning "attacks launched from outside Nicaragua against that country's strategic installations" as well as the "continued losses in human life in EL. Salvador and Honduras and the destruction of important public works" in those countries.

On April 9, 1984, Nicaragua filed a case against the United States in the International Court of Justice at Hague charging the U.S. with waging 'Covert' war to topple the government in Managua (Nicaragua). Nicaragua requested the world court to make a

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complete and open examination of the facts in accordance with due procedure of law and placed following facts in this connection :—

(i) More than 6000 counter-revolutionaries raided Nicaragua last month.

(Ii) Thev mined the three main seaports damaging Dutch, Panamian. Soviet. Japanese and British owned ships besides threatening to cut off Nicaragua economically from the rest of the world, and

(iii) The Reagan administration is currently seeking sterling 21 million in funding to support contra-activities and already lost more than 1300 lives. In reply the U.S. submitted two points. First key issue in the case was whether Nicaragua had ever accepted the jurisdiction of the International Court of Justice. The second major contention of the U. S. was that political and security problems in Central America should be dealt with by U. S. or other political bodies rather than by the court.

The International Court of Justice indicated interim measures on 10th May 1984 holding unanimously that the U. S. should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaragua ports, and in particular the laying of mines. The Court gave its final verdict on 27 June 1986. Dr. Nagendra Prasad Singh President of the Court observed "..... the arming and training of the contras is a violation of the prohibition of the use of (as laid down in the U. N. Charter). .....the financing of the contras undoubtedly constitutes intervention in Nicaragua Sovereignty by the U. S. A."

But it should be noted here that the U. S. Government announced its decision to ignore the world court's verdict. The U S charge is that the objectives of the court were being subverted by Nicaragua's effort to use the court as a political weapon President Reagon has expressed the view that the Nicargua's Scandinista Gover nment must be overthrown if it continues to refuse to share power. He has further said that unless the Nicarguan Government sought democracy the only alternative for the rebels would be to "have their way and take over." A pertinent question therefore arises as to whether a state is entitled to intervene in the affairs of another state to overthrow government or to restore democracy. Present International Law does not permit such type of intervention.

(17) The Problem of Future of Hongkong :

The Hongkong has been under the colonial rule of Britain for a long time. Nearly Ninety two percent of its territory was acquired through international treaties (of lease) for 99 years. The remaining was acquired for perpetuity through cession. As regards the major

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portion, the lease is to expire in 1997. With a view to solve the problem of the future of Hongkong. Mrs. Margaret Thatcher, the British Prime Minister went to Hongkong. In view of the Falklands Island crisis, the effort to solve the problem has further increased. The second round of talks between the British and Chinese leaders was held in July 1983. The Chinese leaders have threatened to start exercising their Sovereignty over Hongkong even before 1997, if no satisfactory agreement was made. On the otherhand, Britain seems to be reconciled to the fact that Hongkong will be under the Sovereignty of China after 1997. In April 1984, the British foreign secretary, told the people of Hongkong that Britain would be returning them to China's control, in 1997, and that there would be no British involvement in Hongkong's administration after that date. He added that Britain would be continuing to negotiate with China to seek a future arrangement for Hongkong that would assure continued autonomy for the territory. Recently in the month of December, 1984, the British Prime Minister Margaret Thatcher went to China, and signed an agreement to return Hongkong to China, after 1997.

As pointed out above, Britain had acquired major portion of Hongkong, through lease. China had contended that she is not bound by such unequal treaties. Thus China claims Sovereignty over Hongkong. In reply to China's claim following options are mentioned in British circles :—

(a) Britain can argue that Hongkong is a British territory ;

(b) Britain can contend that it exercises Sovereignty over Hongkong ;

(c) The third option open to Britain is to emphasise the validity of the treaties entered into 19th century.

The British Prime Minister Mrs. Margaret Thatcher preferred the last option and contended that treaties under which Britain acquired Hongkong are still valid. She said that Britain had a 'moral duty' towards the people of Hongkong.

Nearly ten percent of the territory of Hongkong has been acquired by Britain through perpetuity. The problem of Hongkong is also related to the problem of colonialism in general It is necessary to mention here the principle of self determination which has become a binding principle in the International Law in the context of colonialism. Therefore, much depends upon the people of Hongkong. They are entitled to determine whether they shall remain with Britain or China.

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(18) The Problem of Tamils of Indian Nationality, in Sri Lanka :

The issue of Tamil in Sri Lanka took a serious magnitude in July, 1983, when attrocities were committed on them. Their problem is not new as several attempts were already made to solve it. Agreements of 1964 and 1974 deserve special mention in this connection. Under these agreements India agreed to accept 6,00,000 Tamils (including natural increase thereof) within 15 years. Sri Lanka agreed to accept 3,75,000 (including natural increase thereof) within the same period. Later on the agreement of 1964 was extended for a period of two years (i. e. upto 1981). By December 1982, more than 400,000 (including natural increase thereof of 15000) stateless Tamils had been granted Indian Citizenship. During the same period, Sri Lanka had also granted its citizenship to 2.30,000 Tamils. Thus, the fate of 4,00,000, Tamils remained undecided. From 1982 India stopped granting passports to new applicants because in view of the slow process through which the said Agreement was being implemented, the problem could never end. India wanted Sri Lanka to take the responsibility of the rest of Tamils in that country. One of the main reasons for slow implementation of the Agreement was that the masters or Employers of the Tamils were not prepared to release them immediately as their position could not be filled up soon by workers of Sri Lanka. The incidents that took place in July, 1983 were part of the same problem. The violent acts against them (Tamils) assumed such magnitude that more than 2000 Tamils lost their lives and thousands of Tamils were injured, and lakhs were compelled to leave their homes. The demand of the political representatives for a separate Tamil State further complicated the issue, which made the Government to ban following three political parties—(a) Communist Party of Sri Lanka, (b) People's Liberation Front and (c) New Socialist Party. Laws were also enacted in this connection. The Government also proposed an amendment in the Constitution which would ban the Tamil United Liberation Front.

The attrocities on Tamils of India, caused a great anxiety in the minds of Indians. The Government of India did not lose patience, declared its concern with attrocities of Tamils and expressed its desire to Sri Lanka Government for its services and assistance for the solution of the problem. The Government of India had made several rounds of talks with Sri Lanka Government. In December, 1983, there was consensus in the United National Party (the Ruling Party of Sri Lanka), to invite TULF in all party conference to tackle the problem. The All Party Conference of Jan. 1984 could not make any headway.

Recently, there have been more attrocities committed on Tamils of Indian nationality. On June, 1984, the Prime Minister of Sri

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Lanka declared that the issue of Tamil Nadu harbouring Sri Lankan terrorists would be taken up at the United Nations. If this threat was carried out, would naturally further embitter relations between Sri Lanka and India and would complicate the issue also.

It may be noted that the T. U. L F.'s demand for a separate Tamil State is an internal matter of Sri Lanka. However, this demand cannot be justified. But the violation of *human rights* is a serious matter. It can not be treated as an internal matter of Sri Lanka. The attrocities committed on Tamils of Indian Nationality are clearly violative of human-rights. In June 1984, the Geneva based International Commission of Jurists has criticised the laws enacted by Sri Lanka in the wake of ethnic violence last year. According to the report of the Commission, Prevention of Terrorism Act. and the Emergency Regulation Act are "unjustified in law" and in fact are "grossly disproportionate" to the threat faced by the State. On June 12, 1984, Amnesty International urged the Sri Lankan President to prevent the killings of civilians by security forces in the country. The Amnesty International repeated earlier calls to the Sri Lankan Government to adopt urgently measures to prevent violations of such human rights as the right to life, the right not to be tortured and the right not to be subjected to arbitrary arrest and detention. On August 1984, the U. N. Sub Commission on Prevention of Discrimination and Protection of Minorities has expressed its deep concern over the violence in Sri Lanka.

During July 1986, President Jayewardhane proposed a peace which envisages devolving of some central powers to elected provincial council allowing Tamils to manage their affairs on areas where they predominate. During the Summit of the SAARC in November 1986. President Jaywardhane of Sri Lanka and Prime Minister Rajiv Gandhi held detail talks to resolve the problem. It was reported that some progress was achieved to resolve the statement.

(19) American Intervention in Grenada :

Grenada is a small Island in the South-East of the Caribbean Island. This Island consisting mostly of African people has a population of 1,15,000. These people speak English and most of them are the followers of Roman Catholic religion Grenada which was a British Colony, received its independence in 1974. After five years of independence, a Marxist Government was formed, under the Prime-Ministership of Mr. Maurice Bishop who was killed on 20 October, 1983. Mr Bishop was removed by a coup led by Deputy Prime Minister Bernard Coard. Mr. Bishop had accused Mr. Coard and his wife of hatching a plot to kill him. Mr Bishop who wanted to make the Island, 'a Holiday Paradise' accepted a Cuban Proposal to construct an airport in the South of the Island. In order to

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implement this plan, four hundred Cuban Technicians also arrived from Cuba. This created suspicion in the minds of Americans that the scheme was being implemented to increase Communist influence in Latin America. Consequently America stopped all aids to Grenada. Britain also followed the suit. After killing Mr. Maurice Bishop, the military rulers had assured the people that they would follow the path of Independence and Neutrality.

The Revolutionary Military Council (RMC) had also committed itself to follow the policy of improving the relations with America. In the mean time the Russia had accused America of intervening in Grenada and of aligning the members of Caricon (Caribbean Economic Community) to its policy of intervention. On 25th October 1983 America and 6 Caribbean countries (Antigua, Barbados, Dominica, Jamaica, St. Lucia and St. Vincant) attacked Grenada. As a result of this attack more than 1900 people were killed. Nicaragua requested the Security Council to consider this matter Most of the countries of the world condemned this action of America.

The Security Council considered the matter in October 1983. America and Britain contended in the council that intervention in Grenada was made for the Security of Americans in Grenada. It may be noted here that Mr. Maurice Bishop had the support of Russia and Cuba. On 2 November 1983, the General Assembly called for an immediate cessation of the armed intervention in Grenada and immediate withdrawal of foreign troops from Grenada.

The above discussion makes it clear that America is guilty of armed Intervention in Grenada as it is a violation of International Law. America has sought to justify its action on following three grounds :—(1) Safety of inncocent people ; (2) To check disorder in Grenada ; and (3) To establish law and order in Governmental Institutions in Grenada. All three grounds are unjustified in accordance with International Law and Charter of U. N. No State is entitled in the affairs of another except on the grounds of self defence. Disorder if any in Grenada, is internal and domestic affair of Grenada. Third ground is also untenable as military coup had not led to an increase of disorder in Grenada.

(20) Vienna Convention on State Property, Archives & Debts, 1983 :

This Convention of 1983, is the most important piece of codification relating to State succession in respect of State Property, Archives and Debts The text of the convention was prepared on the basis of a draft submitted by International Law Commission. The convention was adopted on 8 April, 1983, by a role call Note

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of 54 in favour to 11 against with 11 abstentions. The convention was intended to complement the 1978, Vienna Convention on succession of State in Respect of Treaties.

Vienna Convention 1983, is divided into following six parts :–

Part I —entitled with 'general provisions' deals with the scope of the text, definition of the terms used and cases covered by the convention.

Part II —deals with the passing State Property to a successor State.

Part III.—entitled "State Archives" lays special emphasis on preserving the integral character of groups of State archives of the predecessor State (article 25).

Part IV.—of the convention is relating to "State Debts" the financial obligations of a predecessor State towards another State or an international organisation. Art. 36 of the convention provides that the succession of a State does not as such affect the rights and obligations of creditors.

Part V.—deals with "Settlement of Disputes" and provides for settlement of disputes arising from the interpretation or application of the convention by such means as consultation and negotiation, conciliation, judicial settlement and arbitration, and common consent.

Part VI.–deals with final provisions and provides that the convention will enter into force on the thirtieth day following the deposit of the fifteenth instrument of ratification.

The International Law Commission, while approving the draft article in 1981, affirmed the value of a convention to codify existing legal opinion regarding the rules of international law in that regard. In view of the Commission, the convention would lead to general agreement as to the content of law which it codified, thereby establishing it as the accepted customary law on the matter.

(21) U. S. Attack on Libya.—On 15 April, 1986, American aircrafts attacked two cities of Libya-Tripoli and Bengazi. The U. S. President Ronald Reagan declared that such attacks would be repeated if Libya did not cease terrorist activities against the Americans. This American attack has been severely criticised all over the world. India termed it as an "aggression." Soviet Union warned that grave consequences would ensue if America attacks and said that it was an aggression in violation of the existing rules of inter-State relations.

America charged Col. Gaddafi of Libya with running a "reign

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of terror" and President Reagan called Gaddafi as "The mad dog of the Middle East." The American Government justified the attack against Libya was a reprisal against terrorist activities against American Nationals and was launched to discourage Libya from engaging in such terrorist activities The said American action was the immediate reaction of Berlin explosion wherein one American and one Turkish h.d died. According to Reagan, Libya was responsible for Berlin explosion. The U. S. Secretary announced that the objective of U. S. air attacks was to overthrow the Government of Col. Gaddafi in Libya.

The matter of American attack on Libya was raised in the Security Council of the U.N. and an endeavour was made to condemn American action through a resolution. The resolution asked the parties to settle their disputes through peaceful means. But this resolution could not be passed for it was defeated by triple veto exercised by U.S., U.K., and France. Thus the Security Council failed to take any action in the matter. However, the General Assembly of U N. on 21 November, 1986 passed a resolution condemning tne U.S. military attack against Libya.

Legal Aspect.—The main contention of America is that it had launched attack on Libya in retaliation against Libya's terrorist acts against American Nationals and targets.

But the American action is not justified on the gronnd of reprisal. In the first place, there is no clear cut evidence that Libya was guilty of terrorist attacks against Americans, especially for Berlin expolsion. Even if it is accepted that American accusation is correct, American action of reprisal is not justified as for valid reprisal following conditions must be satisfied :—

(a) Reprisal is justified only when a state (against which it is resorted to) is guilty of violation of international law ;

(b) Action in reprisal can be taken only when demand for compensation has been made and has been refused, and

(c) There must be a reasonable proportion between the action in the form of reprisal and the act complained of, that is to say, harm can be inflicted in proportion to violation of rules of international law, and

(d) The action taken as reprisal should not violate the provisions of the U N. Charter, especially Articles 2 (3) and (4). Article 2 (3) envisages that : All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

Thus we see that American attack is flagrant violation of inter-

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national law including the U.N. Charter and must be universally condemned.

(22) Star Wars and International Law.

The Star war project is *Strategic Defence Initiative* plan. The plan is based on the strategy that if America was ever attacked by nuclear weapons, it would destroy the said weapon in the outerspace or space and would not allow them to come down on earth. The American 'Star War' plan also takes into account the possibility of a limited nuclear war. Science advisers to the U S. Congress have opined that President Ronald Regan's Star Wars missile defence programme will substantially increase America's safety under certain conditions. They have however cautioned that it may never be able to protect the entire country from nuclear attack. Further the S.D.I. programme carries with it a risk that it may create an entirely new arms race and may create severe instabilities if it makes the Soviet's think the United States is seeking a first strike capability. The Soviet Union on the other hand announced that it would feel free to deploy anti satellite systems in space if the United States conducted its planned test of an anti-sattellite weapon. But the United States did not stop its planned test of and research on anti-satellite weapons.

Legal position of 'Star War' under International Law may be studied under two heads :—

(i) Laws of outer space ; and

(ii) Laws of War.

(i) **Laws of outer space.**—Article IV of the Outer Space Treaty 1967, provides that state parties to the treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, install such weapons on cellestial bodies, or station such weapons in outer space in any other manner.

(ii) **Laws of War.**—So far as Laws of War are concerned the use of nuclear weapons on threat thereof is clearly violative of International Law. But the test and manufacture of nuclear weapons by a sta e will not be violative of International Law so long as it does not affect other sovereign share or is not inconsistent with the provisions of a treaty.

It may be noted here that 'Star War' is violative of Anti-Ballistic Missile Treaty, 1972 also and is not in accordance with the Article 1 (i) of U.N.'s Charter which in purpose is to maintain peace and security. It has disastrous effects of accelerating arms race also.

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Recently the U.S.S.R. lifted nuclear test moratorium on April 11, 1986 on the refusal of U.S. to stop war's project.

(23) Star Peace Plan.

The Soviet Premier, Mr. Nikolai Ryzkhov submitted proposals for a 'Star Peace' programme as an alternative to Star War's project of U.S, on June 12, 1986. This plan was submitted in response to U.N. appeal to member states to submit their ideas on development of International co-operation in averting arms race in space and in its peaceful co-operation. The Soviet Union proposed the holding of an International conference before 1990 for establishing a world space organisation as the first step towards exploiting outer space and even the moon for the benefit of all humanity in the coming century.

The 'Star Peace' plan envisages the peaceful exploration of space by all humanity in three stages. The first stage, leading to the establishment of the world peace organisation is to begin immediately with a study of the requirements of the peoples of the world in using space technology. During the second stage of material preparations in the first half of the nineties, space systems under the agreed, projects could be designed and created. The third stage envisages the launching of space crafts, ground systems and implementation specialised programmes. The spacecrafts envisaged includes arbitral stations and commercial space platforms, interplanetary spaceships, and colonisation of the moon and its use as the base for flights to other planets.

Soviet Leader Mr. Mikhail Gorbachov in his recent visit while addressing the two houses of Parliament on November 27, outlined three major proposals-demilitarisation of the Indian ocean, enhancement of the authority of the United Nations and for launching a 'Star Peace programme for the peaceful exploration and the use of outer space.

It may, however, be noted that 'Star Peace' plan can have chances only when super powers join them. So long as Mr. Ronald Regan holds the reins of the U S. there seems to be likelihood of joining the 'Star Peace' plan In this regard the Non-Aligned Movement (NAM) can play a useful role in this respect.

(24) Delhi Declaration (27th November, 1986).

Soviet Leader Mekhail Gorbachove and Shri Rajiv Gandhi Prime Minister of India signed the joint declaration setting forth the following ten principles for building a nuclear weapon free and non-violent world on 27th November, 1986 at New Delhi :—

(1) Peaceful co-existence must become the universal norm of international relations.

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(2) Human life must be recognised as supreme.

(3) Non-violence should be the basis of community life.

(4) Understanding and trust must replace fear and suspicion.

(5) The right of every state to political and economic independence must be recognised and respected,

(6) Resources being spent on disarmament must be channelled towards social and economic developments.

(7) Conditions must be guaranteed for the individuals harmonious development.

(8) Mankinds material and intellectual potential must be used to solve global problems. The world's oceans, the ocean floor as well as outer space are the common heritage of mankind.

(9) the "balance of terror" must give way to comprehensive international security.

(10) A nuclear-weapon free and non-violent world requires specific and immediate action for disarmament. It can be achieved through agreements on the following :—

(a) complete destruction of nuclear arsenals before the end of this century.

(b) barring of all weapons from outer space, which is the common heritage of mankind.

(c) banning of nuclear weapon tests.

(d) prohibition on development of new types of weapons of mass destruction.

(e) banning of chemical weapons and destructions of their stock piles.

(f) reducing the level of conventional arms and armed forces.

Pending the elimination of nuclear weapons, Indian and Soviet Union proposed that an international convention banning the use or threat of use of nuclear weapons should be concluded immediately. This would constitute a major concrete step towards, complete disarmament. The Declaration finally notes that the danger that threatens mankind is grave. But mankind has the power to prevent a catastrophe and prove the way to a nuclear free Civilisation.

(25) Africa Fund—

The concept of Africa fund emerged at the Harare Summit of

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Non Aligned Movement. Its aim was to resist invasion, Colonialism and Apartheid. On 24th Jan 1987 the Africa Fund Summit of nine non-aligned nations India. Zombabwe, Zambia, Algeria, Congo, Peru, Yugoslavia, Nigeria and Argentina, began at new Delhi. The 25th Jan 1987 is the red letter day in the history of the Africa Fund as on that day the fund formally came into existence with an opening balance of $70 million. India, the Chairman of the Fund announced contribution $40 million. India also promised to supply commodities and technical know how for building infrastructure in the frontline South African countries. Member nations are free to contribute in cash or kind. Headquarter of the Africa Fund is New Delhi and its banker is State Bank of India.

Aim of the Fund—

(i) To provide emergency assistance to the liberation movements in South Africa and Namibia, (ii) To strengthen the economic structure of the frontline states of South Africa. (iii) The Fund is maintained to effectuate the action plan consisting of nine sections namely : (a) Strategic relief, (b) transport and communication ; (c) negative trade effects ; (d) oil and other forms of energy ; (e) safe functioning of vital economic installations and networks ; (f) human skills for management of national economics ; (g) rehabilitation of migrant labour ; (h) support to the liberation movements in South Africa and Namibia and (i) mobilisation of public opinion and financial resources.

(26) Closure of observer mission of P.L.O. at New York.

A Law for the closure of P.L.O. Information Mission situated at Washington and P.L.O. Observer Mission situated at New York was passed by American Congress in 1987. According to the directions of American Congress the said offices of P.L.O. were to become non-functional by 21 March 1988.

The decision of American Congress was reacted by the member of NAM nations.

Following events took place pursuant to the decision of American Congress.

(i) A special session of the General Assembly was convened in the first week of March 1988.

(ii) Two resolutions were adopted. These resolutions were submitted by India and 43 other States.

(iii) According to first resolution International Court of Justice should be requested to give its adivisory opinion on the dispute relating to P.L.O. observer mission.

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(iv) pursuant to the above mentioned resolution the World Court was requested in March 1988 by the Secretary General of the U.N. to give its advisory opinion.

(v) The Under-Secretary General of the U.N. told the I.C.J. that by attempting to close P. L. O. observer mission America was violating the agreement between U.S. and the U.N. (12th April 1988).

(vi) The case relating to closure of P.L.O. Observer Mission was pending in American Court (25th March 1988).

(vii) The matter was taken up in I.C.J. (12th April 1988) and Judge Stephen Schewebel expressed the opinion that American Court may decide in favour of P. L. O. hence advisory opinion regarding the arbitration was premature.

(viii) The opinion of the Learned Judge of I.C.J. proved to be correct. On 30th June 1988 the American Federal District Court dismissed the petition filed by Reagan administration for the closure of P. L. O. Observer Mission.

Legal aspects—

Under the agreement that established the United Nation's Head quarters in New York, United State of America is under an obligation to refrain from impairing the functioning of the United Nations. In the light of the agreement U. S. cannot close the office of P. L. O. Observer Mission.

So long as the Headquarters of United Nations are in the New York under the said agreement America cannot prevent the entry of any person invited by the U. N. The decision of the American Federal Distt. Court gave a green signal to the visit of P. L. O. leader Yasser Arafat.

However, the office situated at Washington can be closed by the U. S. Government as it is not covered under said agreement hence cannot be termed as violative of agreement or obligation of any rule of International Law.

(27) U.S. Attack on Libyan Jets—

On January 4, 1989, two Libyan Jets were shot down by the American Navy fighter Jets. The Jets were shot over the international waters of Mediterranean sea.

Root Cause of the incident.

The incident of shooting down Libyan Jets was due to Ameri-

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can allegation that Libya had a newly constructed plant to make chemical weapons 55 km. South west of Tripoli. Americans claimed to have proof of it The British Government also affirmed that the disputed plant was designed to produce the deadly materials. According to them Libya was engaged in the construction of a chemical weapon plant since 1987. The aim of the plant was stated to be the production of poisionous gas.

The allegations raised by the U.S. and U.K. were denied by the Libyan Government and they asserted that the plant is meant to produce pharmaceuticals. It also offered the inspection of plant by the international experts.

Resentment by Arab Nations—

The Arab nations expressed their unhappiness and condemned bitterly the shooting down of two Mig 23 Jets of Libya. They promised to extend their help to Libya. The strong critcism of the event forced the U. S. to abandon its attack on the disputed Libyan Plant.

A draft was submitted by the members of NAM nations and the matter was raised in the Security Council. The resolution could not get through as it was treated with triple veto by U.S., U.K. and France. (12 Jan. 1989).

Problem : its Legal aspects—

Shooting down of Libyan Jets by U.S., Air force planes is a gross violation of the principles of International Law. The incident cannot be justified on any ground whatsoever neither International Law nor the Charter of United Nations permits such action by any State.

The U. N. Charter does not permit any State to assume the role of International policemar Had the allegation of America against Libya been correct, even then present international law would not have permitted or justified the act done by the America.

The act of triple veto by U.S., U.K. and France is merely an abuse of the power and a clear cut indication of lobbying This action cannot be termed as violation of the Charter of United Nations. Because power to exercise veto is a special privilege provided to 'big fours' and they often misuse it to protect their misdeeds or to showdown the acts and moves of opposite camp nations.

(28) Action of Government of India in relation to Tamil problem in Sri Lanka :

Note : For the root cause of the Tamil Problem in Sri Lanka please see the answer to Short Note No. 25.

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Till November 1984 situation in Jafna started taking a worse shape. Repeated discussion till 1986 could not stop the brutal killings of Tamils in Sri Lanka. It was January 1987, when Indian Government warned Sri Lankan Government not to resort to military action but to adopt political solution of the problem. The increase in the military actions by the Sri Lankan Government against the Tamils forced Indian Government to take the course of warning. But the Sri Lankan Government paid no heed to the warning given by the Indian Government. The situation in the Jafna took a worse shape as a result thereof Indian Government decided to send food, medicines and other essential commodities to the inhabitants of Jafna. This decision was taken on June 1, 1987. These supplies were to be made on humanitarian grounds in boats flying Red Cross flags. The Government of India made it clear that the boats carrying essential commodities will not carry armed personnel but press personnel and members of Indian Red Cross were to be sent on the boats. The proposal of aforementioned kind was turned down by the Sri Lankan Government and they stopped the Red Cross flags bearing boats from entering the territorial waters of Sri Lanka. Pursuant to the return of the boats the Indian Government adopted another course. It arranged five A. N 32 Transport Aircrafts escorted by 4 Mirage 2000 aircrafts to airdrop the essential commodities for the people of Jafna. The mission was completed successfully despite the resentment of the Sri Lankan Government Situation in Jafna was so alarming that Government of both nations agreed in principle regarding the supply of necessities to Jafna. Tamil problem has taken an alarming shape therefore, it needed to be solved immediately. Keeping in view the urgency of the matter P. M. of India and the President of Sri Lanka agreed to solve the Tamil Problem. An accord in this regard was signed on 29th July 1987.

Provisions of accord.

(i) The Northern and Eastern Provinces would form one Administrative Unit having one Directorate, one Provincial Council, one Governor and Board of Ministers.

(ii) A referendum would be held before 31 December, 1988 to enable the people of Eastern Province to decide whether they want one or two Administrative Units. (Question of merger of North & East Province was to be decided by referendum). The President may, at his discretion decide to postpone the referendum.

(iii) The Government of Sri Lanka would implement the above proposals and would expect all others to do the same.

(iv) The Government of India would guarantee the imple-

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mentation of the above proposals and would cooperate for the implementation.

(v) The proposal is subject to the condition that if any extremist group does not accept these proposals, the Government of India would take following actions :—

(a) India would ensure that her land is not used for any action which may be prejudicial to the unity, integrity and security of Sri Lanka.

(b) Indian Navy or Coast Guards would do the needful to prevent such Tamil extremists action as may affect Sri Lanka.

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PART III

LAWS OF WAR

CHAPTER XXI

SETTLEMENT OF INTERNATIONAL DISPUTES

Q. 1. Describe briefly the various modes of amicable settlement of State differences. To what extent can United Nations settle compulsorily such differences ?

Or

What are the various amicable means of settling international disputes ? Illustrate your answer from international practice. (I A.S. 1973, P.C.S. 1984, 1987, C.S.E. 1987).

Ans. Amicable settlement of disputes.—Following are the various means of settling differences :—

1. Negotiation.—The Permanent Court of International Justice in the case of the Marrommatis Palestine Concessions observes, that "In the international sphere and in the sense of international law, negotiation is the legal and orderly administrative process by which Governments, in the exercise of their unquestionable powers, conduct their relations with one another and discuss, adjust and settle their differences." Negotiations for the settlement of a dispute may take place either by diplomatic correspondence or in personal conference between representatives of the disputing States. The recent Indo-Chinese border disputes are sought to be settled by the Government of India through negotiations.

Usually, one of the commonest obstacles preventing the successful settlement of a dispute by means of negotiations is the difficulty of ascertaining the precise facts which have given rise to the dispute. But negotiation figures first among the means enumerated in Article 40 of U.N. Charter as incumbent upon the parties prior to invoking the jurisdiction of Security Council.

2. Good offices and mediation.—The Term 'Good Offices' in its comprehensive connotation refers to an act of a third State or its official in trying by friendly suggestion to bring about an adjustment of a controversy between two States. In the dispute between Holland and the Republic of Indonesia the Security Council, having resolved to offer good offices to the parties to effect a peaceful settlement, appointed a Committee of Good Offices in 1947 comprising of Belgium, Australia and the United States. Mediation consists in

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efforts to bring about a settlement between the disputing parties on the basis of the proposals made by the mediator. The distinction between good offices and mediation is very subtle and is to a large extent a matter of degree. In 1948, in the Palestine dispute the General Assembly provided for a Mediator who was entrusted with the duties of reporting on developments, of promoting the welfare of the inhabitants of Palestine, and of assuring the protection of the holy places. The next recent example of mediation is the conclusion of Egypt-Israel Peace Treaty in 1979. President Carter mediated between these two countries and Egypt-Israel Treaty. This treaty ended war there.

3. **Conciliation.**—"Conciliation".....is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposals formulated." [*Hudson*—International Tribunals (1944) P 238]. Generally speaking, the term 'conciliation' covers the great variety of methods whereby a dispute is amicably settled with the aid of other States or impartial bodies of inquiry or advisory bodies. In the restricted sense, however, the term 'conciliation' denotes the reference of a dispute to a Commission or Committee to make a report with proposals to the parties for settlement. Conciliation Commissions were provided for in the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes. In 1965, the Convention of Settlement of the Investment Disputes between States and the Nationals of other States established Conciliation Commission for the settlement of the disputes.

4. **Enquiry.**—The International Commission of Enquiry, without making specific recommendation, establish the facts which may be in dispute and thereby prepare the way for a negotiated settlement. In cases of boundary disputes where historical and geographical facts are not free from controversy, a Commission may be appointed to enquire into those facts in order to classify the issues for a boundary agreement. The Security Council established a commission in 1979 to examine the situation relating to settlement in the Arab territories occupied since 1967.

5. **Arbitration.**—The development of international law brought arbitration into prominence. It was at the end of eighteenth century that States began to utilize arbitration as a method of adjusting controversies among them. In 1794 Jay Treaty of arbitration between Great Britain and the United States was concluded. Thereafter several treaties, providing for arbitration on a number of disputes, were signed between different States. But, a great impetus to arbitration was given by the *Albama Claims Award of 1872* between the United States and Great Britain. A most important step, however,

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was taken in 1899 when the Hague Conference not only codified the law as to arbitration but also laid the foundation of the Permanent Court of Arbitration. The Permanont Court of Arbitration gave its award in many important international disputes including those in the *Pious Fund case of 1902* between the United States and Mexico, *the North Atlantic Coast Fisheries* case of 1910 between the United States and Great Britain and the *Savarkar* case of 1911 between Great Britain and France. The Kutch Arbitration Award of 1968 is a recent example of the settlement of dispute by this means.

"Arbitration means the determination of a difference between States through a legal decision of one or more umpires or of a tribunal other than the International Court of Justice chosen by the parties". [*Oppenheim*—International Law Vol. II (VII Ed.) p. 12]. Arbitration is a judicial function and is closely allied to judicial settlement by International Court of Justice. The arbitrators are chosen by the parties and their award is as much binding on the parties as a decision of the Court. "Arbitrators and judges are alike bound to decide according to the rules of law neither-possesses a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just". [*J.L. Brierly*—The Law of Nations P 25]. Arbitration differs from mediation An arbitrator discharges a judicial function inasmuch as he decides the matter by applying International Law and judicial methods, while a mediator discharges an advisory function inasmuch as he recommends and advises the parties on a solution of dispute The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. [*Westlake*—Interational Law (II Ed.) P. 384].

6. **Judicial settlement.**—"Starke" points out that by judicial settlement is meant a settlement brought about by a properly constituted international judicial tribunal applying rules of law The only general organ of judicial settlement at present available in the international community is the International Court of Justice at Hague, which succeeded to and preserves continuity with Permanent Court of International Justice. For detail, please see question on International Court of Justice.

7. **Settlement of disputes under the U N.O.**—This has also been discussed in answer to a previous question Please also refer to Question on Collective Security under the U.N. Charter.

Q. 2. Discuss briefly the varions methods short of war for extorting redress from another State.

A. Compulsive Means of settlement of dispute.—When amicable means fail to bring about settlement of international disputes, international law recognizes the rights of States to employ non-amicable

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process involving actions short of war for the purpose of solving the differences. The non-amicable or compulsive means, the retortion, reprisal, pacific blockade, embargo and intervention.

1. **Retortion.**—Retortion technically means retaliation. *Oppenheim* defines retortion as "retaliation for discourteous or unkind or unfair and inequitable acts by acts of the same or a similar kind", [*Oppenheim*—International Law Vol. II (VII Ed.) P. 134]. According to *Westlake*, retortion refers to "the action taken by a State in order to compensate it for some damage suffered through the action of another State or in order to deter the action complained of", [*Westlake*—International Law Vol. II (II Ed.) P. 6]. Retortion is not strictly speaking a measure of redress for legal injuries. It consists in retaliation where the acts complained of do not constitute a legal ground of offence but are rather in the nature of unfreindly acts done primarily in pursuance of legitimate State interests but indirectly hurtful to other States. Retortion is resorted to chiefly in connection with discriminatory tariffs, domestic legislation against aliens, port restrictions, depreciation of currency and other national legislation not subject to international control. An example is that of Pakistan and Iraq. Pakistan Government asked Iraqi Ambassador to leave Pakistan as some arms were recovered in the Iraqi Embassy. It was alleged that these arms were to be supplied for the use against the established government. Iraqi Government reacted against it and asked Pakistani Ambassador to leave Iraq. 'Retortion may be an answer given internationally to illegal conduct'. [*Hyde*—International Law, Vol. II, P. 1658].

2. **Reprisals.**—Reprisals, in modern times, consist in coercive measures of self-help taken by one State against another for the purpose of securing redress for or of preventing recurrence of an international delinquency. *Oppenheim* defines reprisals as "such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency." [*Oppenheim*—International Law Vol. II (VII Ed) P. 136].

Reprisals are permitted by International Law in all cases of denial of justice and in acts of international delinquency. A reprisal is a reaction of the State which is aggrieved by an act resulting in denial of justice or an international delinquency committed by another State. In the *Naulilaa* case [Annual Digest of Public International Law Cases 1927-29—Case No. 36] involving reprisals by Germany against Portugal for the death of three officers who were killed in the Portuguese territory by member of a frontier post in Angola, the German-Portuguese Arbitration Tribunal laid down that reprisals are only legitimate when they have been preceded by an

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unsuccessful demand for redress and that employment of force is only justified by necessity.

In fact the *sine qua non*, of a resort to reprisals is the existence of a previous act contrary to International Law. It is necessary that before measures of reprisals are taken, the aggrieved State should demand reparation from the delinquent State. The measures adopted should not be excessive or out of all proportion to the provocation received.

Recently on 15 April 1986, American aircrafts attacked two cities of Libya—Tripoli and Bengazi, the main contention of America was that it had launched attack on Libya in retaliation against Libya's terrorist act against American nationals and targets. But the American action was not held justified on the ground of Reprisal.

Reprisals may be positive or negative. Positive reprisals consist in acts involving international delinquency committed by another State. Negative reprisals consits in refusal or failure on the part of the offended State to perform an international obligation on the ground of retaliation Reprisals may also be special and general. General reprisals take place only when the offended State makes warlike operations without any design of making or declaring war. In the modern times forcible reprisals are not valid means of settling international disputes. The resolution of the Friendly Relations Declaration says that 'states leave a duty.'

3. Embargo.—Embargo is a special form of reprisal and consist in detention of ships belonging to the delinquent State in the port of the aggrieved State. The aggrieved State, in order to secure redress of the wrong done by the delinquent State, has a right to prevent ships belonging to the delinquent State, leaving its port.

4. Pacific Blockade.—Pacific blockade consists in cutting of ingress to or egress from a port or coast of the offending State to make redress of the wrong done to the blockading State. In a pacific blockade, there is no seizure of property or person What the blockading State does is to cut off, access to or egress from the port or coast of a foreign State and thus coerce the foreign State to yield to the demands made by the blockading State. Jurists agree that the blockading State has no right to seize and sequestrate ships of third States which try to break a pacific blockade. But in practice which prevailed before 1850 it was usual for the blockading States to seize and sequestrate ships of third State when they tried to break the pacific blockade. Pacific blockades established after 1850 have not given rise to an uniform practice. Sometimes, the pacific blockades were enforced against ships of third States. It is not disputed that the ships of the blockaded State when they try to break the blockade are liable to be seized and sequestered.

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A pacific blockade is to be established only after the failure of negotiation to settle the dispute. A previous declaration as to the date and hour of the establishment of the blockade is necessary. Like a war pacific blockade must be effective.

5. Intervention.—This has already been discussed in a separate Chapter on 'Intervention'.

CHAPTER XXII

WAR AND ITS EFFECTS

Q. 3. "International law neither acknowledged nor denied war. It was simply a happening beyond the power of law to control it like an earthquake or fire. The Law of Nations has contented itself until our own day with effects to ameliorate the horrors of war by making rules for its conduct".—(Engleton : International Government) Comment.

Examine, to what extent war has been recognised as legal or proper under the League Convenant and the U. N. Charter, respectively.

Or

War is 'the legal remedy of self help to obtain satisfaction for a wrong sustained from another State. What steps have been taken to limit this right of States ?

A. War is a necessary evil. It cannot be wiped out of the earth so long as the human race exists. The 'ego' in man always impels him to get solution of every thing according to his own choice. This "hired assassin's trade" and "game of politicians" has been in vogue from the earliest period of human civilization and will continue to exist for ever. No one can rule out its periodical outburst. It is a natural phenomenon. Ir is the legal remedy of self-help/to get redress of the wrong by use of force. It can be abolished by itself alone. For this very reason, the Law of Nations neither acknowledged nor denied war. It had but to face it.

In the absence of any central authority powerful enough to enforce International Law, the possibility of war cannot be altogether eliminated. The experience of the last two global wars teaches us that no acts, no treaties, and no world conventions are effective in preventing recurrence of wars It would not be an exaggeration to say that human history is the history of wars. Despite the growth of opinion pervading the international society that differences between States should be settled by amicable means, and whenever feasible, by judicial process, and notwithstanding the formal renunciation of war by most of the States as instrument of

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national policy, the opinion still prevails in many quarters that a controversy may come into being for the adjustment of which the parties will probably rely upon the sword regarding the recourse to war as a reasonable and perhaps necessary or honourable procedure.

War is a biological necessity. It provides an outlet for the combative instinct of man. It is, therefore, certain that whether International Law likes it or not, war will persist so long as man has his natural weakness and desire for acquisition and self-aggrandisement.

Thus, war could not be prevented, International Law provided some rules for its conduct in order to lessen its destructive savagery. The "laws of war" consist of the limits set by International Law within which the force required to over-power the enemy may be used. Under the present rules, such acts as the killing of civilian, the ill-treatment of prisoners of war, the military use of gas and sinking of merchant-vessels without securing the safety of the crew are unlawful. Since the nineteenth century, the majority of the rules have ceased to be customary and are to be found in treaties and conventions. Among the most important of these intrument, are :

(i) The Declaration of Paris, 1856 ;

(ii) The Geneva Convention, 1864 ;

(iii) The Declaration of St. Petersburg, 1868 ;

(iv) The Hague Conventions of 1980 and 1907 ;

(v) The Geneva Gas and Bacteriological Warfare Protocol, 1925 ;

(vi) The Sub-marine Rules Protocol, 1936 ;

(vii) The four Geneva Red-Cross Conventions, 1949, namely, those dealing with prisoners of war, sick and wounded personnel of armies in the field and of forces at sea, and the protection of civilians.

War Under the Leaque Covenant.—In the League Covenant provision was made for settling disputes peacefully by referring the case to arbitration, judicial settlement or other amicable means through the League. When the decision was not to the satisfaction of the parties they could resort to war after three months of such decision.

War under the U. N. Charter.—The U. N. Charter aims at saving succeeding generations from the scourge of war. By laying down various provisions for pacific settlement of disputes and taking enforcement actions, the U. N. Charter aims at avoiding the

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possibility of war. However, Article 51 provides to take up arms in self-defence against unprovoked aggression but this continues only till the Security Council takes measures necessary to restore peace.

In spite of the best efforts, the League failed to prevent the Second Wor'd War, and, though the time has not yet come to take a test the U. N. cannot prevent wars at least by the Big Five which have the veto power. The situation of Congo shows that the U. N. is unable to prevent war because of the political wranglings of the so-called Big Powers.

Q. 4 (a) What do you understand by war ? Give ingredients. (C. S. E. 1988).

Or

'War is one word but not one thing', Comment. Differentiate between 'War' and 'Civil War'.

(b) Is a formal declaration of war essential to the actual existence of war between two States ?

Or

'It was one of the oldest and best established rules of international Law that a State must not resort to force against an opponent without giving due warning that hostilities were about to commence'.

Discuss the genesis of this rule and point out the extent to which it has been adhered to in recent years. Refer to actual practice in this behalf. (P. C. S. 1957).

A. **(a) Definition of War.**—War is, at present, not a means of self-help recognized by International Law. The conception that every State has a right to make war does no longer exist. The question is whether war stands for a specific statute or a specific action and whether war is a bilateral or unilateral action. No unanimity among writers and jurists exists on this matter. *Grotius* defined war as a state or condition of Governments contending by force and to him war meant a specific status Other writers like *Kelsen* regard war as a specific action and not a status. *Kelsen* holds that war whether considered to be a delict or a sanction cannot be defined as bilateral action but as an enforcement action involving the use of armed forces. [*Hans Kelsen*.—Principles of International Law, p 31].

The definition of war according to the above theory as given by *Kelsen* is :—

"War is in principle an enforcement action involving the use

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of armed forces performed by one State against another constituting as it does an unlimited interference in the sphere of the interests of the other State."

Oppenheim.—[International Law, Vol. II (Seventh Edition), p. 202], defines war as, "contention between two or more States through their armed force, for the purpose of over-powering each other and imposing such conditions of peace as the victor pleases."

Oppenheim is opposed to the view that war is unilateral. He observes that unilateral acts of force may be a cause of, but cannot amount to, war itself. [*Hall's* definition of war as given below has been judicially approved in *Driefontein Consolidate Gold Miuns* v. *Jonson*, (1902), 2 Q. B. 339 at p. 343.

When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to take upon as a breach of the peace the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as enemy is willing to grant."

In the modern times, the war takes place not only between armed forces between two States but also effects the citizens of the States concerned.

Ingredients of War.—Before actual hostilities between two States may amount to war they must come within the scope of the following essentials of war :—

(i) A contention ;

(ii) The contention must be between two or more States ;

(iii) The contention must be carried through armed forces. Though the concept of modern total war draws even civilians into its folds but still it is the armed forces, which actually carry on the contest.

(iv) The purpose of war is to overpower the enemy.

Oppenheim points out that in any case, war is a contention i. e. violent struggle through the application of armed force. Unilateral application of force by one State against another State may be a cause of outbreak of war, but not a war itself unless answered by similar hostile acts by other side.

Distinction between war and civil war.—A civil war differs from war proper. While war is contention between two States, a civil war exists within a State between revolutionary groups and the legitimate Government of the State. A civil war is an

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internal affair of a State and does not concern with other States. Recognition of insurgents as belligerents turns a civil war into an international war. Sometimes, the actual war between the parent Government and the insurgent forces may reach such dimensions that outside Powers, will be compelled to treat the civil war as a real war between rival Powers, and not a purely internecine struggle. In other words, those Powers have to recognise belligerency.

The State of affairs in Congo or Laos was best example of civil war. And suppose, Pakistan and China begin armed hostility against each other, it will be an example of war proper.

(b) Declaration of war.—It is an ancient rule which requires that a formal warning must precede a war. The ancient Greeks and Romans followed the practice of making a formal declaration of war before commencing hostilities. During the middle ages, heralds were generally sent to make announcement of war to the opposing States. The practice of making formal announcement of war continued for a few centuries after the Middle ages and thereafter fell into disuse. In the eighteenth century it was not considered necessary that a declaration of war must precede war.

Grotius laid down the rule that a declaration of war was necessary for the commencement of hostilities. But this rule did not receive universal acceptance and States regarded themselves free to go to war without making a formal declaration of war. The sudden and unexpected attack by Japan on Russian Fleet in 1904 was in deliberate violation of the rule. In 1906, the Institute of International Law meeting at Ghent resolved that no hostilities should be commenced with sufficient delay after the declaration of war. In 1907, the Hague Conference adopted Convention III relative to the opening of hostilities which laid down the rule that "hostilities must not commence without a previous and explicit warning in the form either of a reasoned declaration of war, or of an ultimatum with conditional declaration of war.

In our times, when war itself is prohibited under International Law the question of the necessity of declaration of war can hardly arise. No state is permitted to use force or threat of force against any State. There is thus hardly any scope for the application of the rule of Convention III in these times.

Ultimatum.—The Hague Convention III provides that a warning of the commencement of war may be in the form of an ultimatum with a conditional declaration of war. *Oppenheim* defines ultimatum as a "written communication' by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically the demdands to be fulfilled if other measures are to be averted. The ultimatum

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required to send under Convention III must clearly express the intention that in case demands made therein are not satisfied there will be resort to war. The convention however does not prescribe in an ultimatum to prescribe any minimum length of time within which demands are to be satisfied or after the lapse of which the hostilities are to commence. The ultimatum is also to be notified to the neutral powers.

Q. 5. Describe briefly the immediate effect of the outbreak of war on various normal relations of States.

A. Effect of the Outbreak of war.—The outbreak of a war brings about a change in the relationship existing between the belligerents and those between their subjects. "War breaks down every relationship between the opposing belligerents which owes its life and vigour to a condition of friendliness and hence, to the maintenance of peace.

The effect of the outbreak of war on various important relations of States may be stated as follows :—

1. Diplomatic and consular relations.—There is a severance of diplomatic relations between the contending States on the outbreak of war with the result that the displomatic envoys are recalled by the accrediting belligerent State and are allowed to leave immediately by the receiving enemy State. There is also an end of consular services between the enemy States.

2. Treaty relationship.—See Q. No. 6.

3. Belligerent subjects in enemy territory —International Law requires that belligerent subjects staying or residing on enemy territory are to be allowed a reasonable time to leave the country, provided they are not likely to be members of the armed forces of the enemy. But belligerent subjects, who are active or reserved officers of the enemy can be prevented and detained by the belligerent States. There is nothing in the rules of International Law to impose an obligation on the belligerents to allow the enemy subject to remain on their territory. In case, a belligerent allows enemy subjects to remain on its territory it can impose restrictions on them but it cannot compel them to join its armed forces or to assist it in war. During the First World War many belligerent interned enemy subjects living on their territory. Great Britain, France and Germany adopted a policy of general internment of enemy aliens but the United States did not do so. In the Second World War, Great Britain did not adhere to the policy of General internment but interned only those enemy aliens who on enquiry by special tribunals, deserved internment.

Enemy aliens allowed to reside in the belligerent country are

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required to be treated properly. The Geneva Convention of 1949 lays down detailed rules regulating the treatment of enemy aliens on belligerent territory and also contains regulations for the treatment of internees on the territory of the belligerent.

4. Right of enemy subjects to sue or to defend.—The practice of many European States like Austria, Hungary, Germany, Holland and Italy is to concede to the enemy subjects the right to bring an action and defend in the Courts of the belligerent during the war. The Practice of Great Britain is as follows :—

(i) An enemy subject residing in an allied or neutral territory is not deprived of his right to sue in the courts of the belligerent.

(ii) Any enemy subject, whether or not residing in a belligerent country possessing a licence has a right to sue in the courts of the belligerent. An enemy subject residing in the United Kingdom is to be presumed to have such a licence if he is registered in the United Kingdom.

(iii) An enemy subject, whether or not residing in Great Britain has a right to bring an action before the proper court of the belligerent provided he claims 'any protection, privilege or relief under any of the Hague Conventions of 1907'.

(iv) A right of action which accrued to an enemy subject before the outbreak of war will not be extinguished by reason of any disability to sue that may be imposed on the enemy subjects in consequence of outbreak of the war. Such a right of action will revive on the termination of war.

(v) An enemy subject on the outbreak of war does not lose his right to defend any suit brought against him.

5. Trade relations.—Trading and intercourse between the subjects of belligerent States cease on the outbreak of war, and usually special legislation is introduced to cover the matter.

6. Contractual-relation.—Refer to Q. No. 9.

7. Enemy Property.—Refer to Q. No. 9.

Q. 6. To what extent is it correct to say that "Treaties are perishable thing and their obligations are dissipated by the first hostility." ? (C. S. E. 1988).

Or

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Discuss the effect of war on treaties. Is the intention of parties or a treaty relevant to their binding force on the outbreak of war? Can a treaty be upheld if its execution is incompatible with the conduct of war? (I.A.S. 1955).

Or

Consider the view that the effect of war on treaties is "one of the unsettled problems of International Law". (I. A. S. 1953 and 1957).

A. Effect of war on existing treaties.—According to Mr. Justice Cardozo, the effect of war on existing treaties to which the belligerents are parties is "one of the unsettled problems of the law".

There is consensus of general opinion that war does not put an end to all kinds of treaties existing between the belligerents. But there is no uniform rule as to what treaties stand annulled or remain effective as a result of the outbreak of war. To quote Mr. Justice Cardozo again, International Law "does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling, as the necessities of war exact."

Applying the two tests of Starks, i.e. (1) subjective tests of intention; and (2) objective test; and having regard to the practice of States, and the views of the modern authorities, the position may be summed up as follows :—

(1) Treaties of political nature not intended by the parties to set up final arrangement but intended to provide a temporary basis for adjustment of some conflicting interests stand abrogated on the outbreak of war. Treaties of alliance or of arbitration are of this type.

(2) Treaties of commerce or navigation which operate during an atmosphere of friendliness may be regarded to be suspended during war. Such treaties are generally revived after the termination of war.

(3) Treaties creating vested rights which were intended to provide for a permanent arrangement between the contracting parties and the operation of which does not depend upon the continuance of peace are not extinguished by the event of war.

The British Court had held that the treaty will not depend upon the continuance of a state of peace.

(4) Treaties, which are final and dispositive in their character and which are intended to create permanent relations in spite

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of any war are not abrogated. Treaties settling boundary disputes and those providing for transfer of territory are of this character.

(5) Treaties, which are intended to be operating during war are not abrogated by war but come into actual effect on war breaking out.

(6) Treaties, which confer certain concessions on a party come to an end in consequence of the outbreak of war between the parties to them.

(7) Multipartite treaties or conventions to which a large number of States are parties and which deal with matters of common interest of States remain in force even on the outbreak of war, with regard to relations between the belligerents and the neutral States. These treaties with respect to relation between the belligerents themselves are however suspended during war.

In the case of Argento-V-Horn (1957), 241 F. (2d) 258, it was held that certain authorities claim that where treaties are suspended during war time, they are not automatically revived when peace comes, but resume their operation only if the treaties of peace expressely so provide. Practice is not very helpful on this point, but usually clauses are inserted in treaties of peace, or terminating a state of war, to remove any doubt as to which treaties continue in force.

Q. 7. Discuss the effect of war on—

(a) Contractual relations ; C. S.E. 1988, and

(b) Enemy property, public and private.

A. (a) Contractual Relations.—These relations are governed by the municipal law of State. As to what effect the outbreak of war produces on contractual relations depends upon the provisions of the municipal laws of the belligerents. The practice of States is as follows :—

1. United States.—If a contract necessitates communication between the territories of opposing belligerents its continuance would be incompatible with the state of war. Numerous agreements are of such a kind and consequently appear to suffer dissolution when war ensues. A partnership agreement is dissolved on the outbreak of war. The contract of agency created before the war and not involving intercourse across the enemy's frontier is, however, not dissolved as a result of the outbreak of war.

2. Great Britain.—Contractual relations arising out of agency, partnership, sales of goods, marine and fire insurance continuing

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from before the outbreak of war suffer a dissolution in consequence of the outbreak of war.

Contracts, which are executory in their nature and which are in respect of right of property are not abrogated as a result of war. Contracts made during and across the line of war are wholly null and void and inoperative.

(b) Enemy property.—According to the earlier practice of the States all enemy property whether private or public, which might be found on the territory of the other belligerent was liable to confiscation as a result of the outbreak of war. *Grotius* recognised this right of confiscation. *Vattel* also declares that a belligerent "takes possession, when he can, of the enemy's property and confiscates it." This rule was modified in the eighteenth and nineteenth centuries. The two World Wars with their elaborate measures taken by nearly all the belligerents further modified this rule of practice. The rule deducible from the attitude of the belligerents during the First and Second World Wars may be stated thus :

Private enemy property.—The modern practice of the States is to take measures through their municipal laws to seize the properties owned by enemy subjects ; put them in the custody of their officers, prohibit payment of profits arising from such properties to the enemy owners, and to dispose of these properties under the provisions of the peace treaties concluded at the end of war. The modern attitude of belligerents with regard to enemy trading concerns established on their territories is to get such of them managed by their own controllers as may be likely to be prejudicial to the belligerent interests.

Private property found on occupied enemy territory is not liable to confiscation unless it is of immediate use in war. Enemy merchantships on open sea are liable to confiscation.

According to proposed Air Warfare Rules of 1928 enemy private aircrafts are liable to capture in all circumstances.

Public Enemy Property.—Movable public enemy property which might be found on the territory of the belligerent at the outbreak of war is liable to confiscation Immovable public enemy property is not liable to be confiscated or otherwise disposed of but it may be used by the belligerent during the war.

Public ships of war and other public vessels at sea are liable to be seized and confiscated. But public enemy vessels which are engaged in religious, humanitarian or philanthropic activities are however not liable to confiscation.

Q. 8. Write a short note on the following :

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(a) Total War.

(b) Fides etiam bosit servanda.

A. (a) Total War.—In accordance with the traditional definition of war, war is a contest between the armed forces of the belligerent states. Its objective is to overwhelm the enemy and impose conditions upon the enemy. This definition has become inadequate in view of the scientific developments in relation to destructive weapons. In the modern times, the war not only effects the armed forces but also the civilians. This nature of war made it impossible for the States to observe the rules of war. Such type of war is called 'total war.' The term 'total war' was first used by Grotius. According to him, thirty years War of Europe was a total war. Josef L. Kunz had said that the total war does not depend upon the unprecedented development of the natural sciences. He further said, "it is also clear that the total war will make illusory even such laws of war as are considered 'compatible with total war', such as rules concerning prisoners of war, sick, and wounded and so on."

(b) Fides etiam bosit servanda.—It means non-hostile relations of belligerent generally. On the outbreak of war, the relations between the belligerent States come to an end. But sometimes, due to some reason, some kind of non-hostile relations continue. Oppenheim said, "It is a universally recognised principle of International Law that, where such relations arise, belligerents must carry them but in good faith. Fides etiam bosit servanda is a rule which was adhered to in antiquity, when no International Law in the modern sense existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention in many respect regulated by law, it is obvious that, where non-hostile relations between belligerents occur, they are protected by law. Fides etiam bosit servanda is, therefore, a principle which nowadays enjoys a legal as well as moral sanction."

CHAPTER XXIII

ENEMY CHARACTER

Q. 9. What do you understand by enemy character ? What tests in International Law determine the enemy character of the following :—

(i) Individuals, (ii) Corporations, (iii) Vessels and (iv) Goods.

A. Enemy Character.—On the outbreak of war normal relations undergo a change and adjustments guided by the necessities of war have to be made. Belligerents in their own interest have to

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take measures against the enemy and all that can be associated with the enemy. They have also certain rights under the International Law with regard to all that have an enemy character. The two World Wars saw varying practices of States with regard to the test of enemy character of persons and goods. The rules deducible from the practice of States for determination of enemy character may be stated thus :—

1. Individuals.—The enemy character of individuals may be discussed under two heads :—

(i) Subjects of Belligerents.

(ii) Subjects of Neutral States.

Subjects of belligerents.—The general rule is that subjects of belligerents have enemy character. According to British and American practice before the First World War enemy subjects residing in neutral States or on territory of the other belligerent lost their enemy character but according to the French practice they retained their enemy character. During the First World War both British and American practice had undergone a change The English Trading with the Enemy Act of 1915 and the American Trading with the Enemy Act of 1917 were legislations which had the effect of introducing a change in the policy which the Great Britain and the United States had hitherto followed in the determination of the enemy character. The main idea underlying these enactments was to prohibit trade with enemy persons or firms or with those who rendered service to the enemy. As summed up by *Lawrence*—Principles of International Law, p. 345—63 the following persons are deemed to be of enemy character in the ascending and descending scale in proportion to the hostile character impressed upon them ;—

(1) Persons enrolled in the enemy's fighting force are enemies to the fullest extent.

(2) Sea men, navigation merchant vessels of enemy State or crews of the merchant vessels of the enemy.

(3) Persons who are followers of an army without directly belonging to it e. g., contractors, newspapermen and reporters etc. it may be noted that such persons if caught are liable to be determined as prisoners of war but may not be killed.

(4) Those persons who are domiciled in enemy country even though neutral by nationality acquire enemy character in case these continue to remain in the enemy country after the declaration of war even for the purposes of trade.

(5) Persons domiciled in enemy country having houses of trade in the enemy country are also deemed to have enemy character.

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(6) Persons living in places held by the enemy merely as military occupant are deemed to be enemies till the occupation lasts. On the cessation of hostilities they are again treated as cirizens.

Subjects of neutral States.—The subjects of neutral States not living on the enemy territory do not possess enemy character. They are regarded to have enemy character when they join the armed forces of any belligerent or commit other acts of hostility against a belligerent. They do not acquire enemy character if they make loans to a belligerent.

But as already referred to, subjects of neutral States living on enemy territory are regarded to have enemy character. According to British and American practice, subjects of neutral States as are domiciled in an enemy territory, acquire enemy character in a limited sense inasmuch as these do not lose the protection of their home State.

2. **Corporation—British Practice.**—International Law contains no rules for determining the enemy character of a corporation. The British practice as based on the case of *Jonson* v. *Driefontein Consolidated Mines* (1902) A. C. 484 is that a corporation incorporated in an enemy country has enemy character. According to *Pitt Cobbett*, the same principle which determines the nationality may be applied to determine the domicile. The domicile of a corporation is the place where the brain which controls the corporation of the company is situate" Dr. E. J. Schuster K. C. is of the opinion that, "The brain of a corporate body is situated in the place, where those who direct its mode of action are accustomed to meet and form their resolutions. Whether those present are designated by the name of directors, is immaterial. There may be nominal directors in one place and so called local directors in another place. But if these local directors have merely to follow orders given by the directors residing at the place of the head office, they do not constitute the brain of the company".

U S. A. Practice.—The United States, after the passing of the Trading with the Enemy Act, 1917, regards companies having enemy character, if (1) they are incorporated within enemy country, (2) they are incorporated in any country other than United States and doing business in an enemy country. During the Second World War, they favoured the application of control test.

3. **Vessels** —The general rule is that the character of a vessel is determined by the Flag under which it sails. This rule was adopted in Declaration of Geneva, 1909. Therefore vessels sailing under enemy flag have enemy character and it makes no difference that its owner is the subject of a neutral State. Another rule is that a vessel owned by an enemy but sailing under a neutral flag does not possess enemy character.

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Vessels flying netural flag assume enemy character in the following circumstances :—

(1) When a neutral vessel takes direct part in the hostilities by being under the order or control of an agent placed on board by the enemy Government, by being in employment of the enemy ; or by being exclusively intended for transport of enemy troops ;

(2) When the neutral vessel forcibly resists the legitimate exercise of the right of visit and capture, and

(3) According to British, American and Japanese practice when the neutral vessel carries on with the enemy during war a trade which was not open to it in time of peace.

The effect of neutral vessels assumming enemy character is that all goods on board the vessel will be presumed to be that of the enemy and would be liable to confiscation.

4. Goods.—The general rule is that goods belonging to individual having enemy character possess enemy character. Since there is no uniform rule determining enemy character of an individual, the enemy character of goods depends upon the varying practice of States.

British and American practice.—All goods belonging to persons domiciled in enemy country bear enemy character and goods belonging to persons not residing to enemy country have no enemy character. As a corollary to this rule, goods belonging to subjects of neutral States residing in enemy country is to be regarded as having enemy character. The property of a trading concern established in enemy country by a subject of netural State not himself residing in enemy country bears enemy character. Also, the goods of a trading concern established in a neutral country by an enemy subject do possess enemy character. In the leading case of the *Venus* [8 Cranch 253 (1814) decided in 1814, the doctrine of domicile was so rigidly applied by the Supreme Court of the United States as to condemn the property of a citizen of the United States who had established his business and residence in Great Britain and who had shipped the goods in question to the United States before knowing that war had broken out between the two countries.

French and Continental practice.—French and many other European States adhere to the principle of nationality in determining the enemy character of goods.

In the London Naval Conference of 1908-1909, an effort was made to reconcile the two conflicting rules, but without result. In consequence, the Declaration of London merely provided that "the neutral or enemy character of goods found on board an enemy

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vessel is determined by the neutral or enemy character of the owner", thus leaving it unsettled whether nationality or commercial domicile should determine the latter point.

Q. 10. State briefly the facts and the principles laid down in Daimler Co Ltd v. Continental Tyre and Rubber Company, (Great Britain) Ltd. [2 A. C. 307].

IN THE HOUSE OF LORDS

Daimler Company Ltd v. Contin ental Tyre and Rubber Co.

[(1916) 2 A. C. 307]

(Enemy character of Corporations [P. C. S. 1977].

Ans. The Continental Tyre and Rubber Company was incorporated in Great Britain and had its registered office in London. More than 90 percent of the shares of this company were held by a German Co which carried on the business of manufacturing motor tyres. The rest of the shares except one which was held by the Secretary of this company stood in the name of some German nationals. Three of the fore directors of this company were residing in Germany when the war broke out and the fourth Director who had been living in England went away to Germany on the outbreak of the war. The business of this company consisted in selling in England motor tyres manufactured by the German company which held the largest number of shares in this company.

The Continental Tyre and Rubber Company raised an action in respect of money due from the appellant : the Daimler Company Ltd. The appellant pleaded that the plaintiff Co. and its officers were alien enemies who were incapable of instituting a suit and that because of the operation of the Trading with the Enemy Act of 1914 the Appellant company was precluded from making the payment. The Court of first instance and the Court of Appeal give judgment in favour of the plaintiff. But the House of Lords held that the action was quite irregular and dismissed the suit.

This case is an authority on the law relating to the enemy character of a corporation. Lord Parker in delivering the judgment of the House of Lords, laid down the following prepositions of the law :—

1. "The company incorporated in the United Kingdom is a legal entity, a creation of law with the status and the capacity which the law confers. It is not a natural person with mind or conscience .....It can be neither loyal nor disloyal. It can be neither friend nor enemy."

2. "Such a company, can only act through agents properly authorised, and so long as it is carrying on business in this country

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through agents so authorised and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's leiges may deal with it as such."

3. "Such a company, however, may assume an enemy character. This will be the case if its agents or the person in *de facto* control of its affairs whether authorised or not. are resident in any enemy country, or wherever residents are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy."

4. "The character of individual shareholders cannot of itself affect the character of the Company.....The enamy character of the individual shareholders and their conduct may however be very material on the question whether the company's agents or the persons in *de facto* control of its affairs are infact adhering to, taking instructions from, or acting under the control of enemies. The materiality will vary with the number of shareholders who are enemies and the value of their holdings."

5. "In a similar way a company registered in the United Kingdom carrying on business in neutral country through agents properly authorised and resident here or in their neutral country, is *prima facie* to be regarded as a friend but may through its agehts or persons in *de facto* control of its affairs, assume an enemy character."

6. "A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy."

CHAPTER XXIV

LAWS OF LAND WARFARE

Q. 11. State the difference between combatants and non-combatants. To what extent can the difference be upheld in the light of modern warfare ?

A. Combatants and non combatants.—'Traditionally International Law maintains a distinction betwen combatants and non-combatants. Combatants are those who directly take part in hostilities and are subjected to all risks of violence and injury during the course of the war. Non-combatants persons are those who do not actually fight but who directly minister to the needs of the force. These embrace for example the personnel of Medical, Veterinary, Legal, Commissary and Pay corps as well as Chaplains and Civil Servants. Non-combatants may not be wilfully attacked and injured. Oppenheim remarks that it will be remembered that numerous individuals belong to armed forces without being com-

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batants. Now, since and in so far as these non-combatants of armed forces do not take part in fighting, they may not be directly attacked and killed or wounded. However, they are exposed to all injuries indirectly resulting from the operations of warfare. Combatants are divided into two classes :

(a) Lawful, and (b) unlawful combatants may be killed or wounded in battle or captured and made prisioners of war. Certain categories of lawful combatants, for example, spies as defined in Hague Regulations of 1970 are subject to special risks or disabilities or in case they are captured to severe repressive measures. Unlawful combatants may be captured and detained along with trial and punishment by military tribunals for their offences.

Through in principle non-combatants, are not to be wilfully attacked or injured, certain classes of non-combatants, such as merchant sea-men are liable to be captured and made prisoners of war. According to the Nineteenth century official pronouncements, the only legitimate object of war was to weaken the military forces of the enemy. In 1863, the following passage appeared in United States Army General Orders :

"The principle has been more and more acknowledged that the the unarmed citizen is to be spared in person, property and honour as much as the exigencies of war will admit."

A laudable attempt to distinguish the combatants from the non-combatants was also made by Narick, who examined the whole question under six heads :—(i) artillery bombardment : (ii) naval bombardment ; (iii) sieges ; (iv) blockade ; (v) contraband ; and (vi) aerial bombardment. He arrives at the conclusion that while non-combatants may not be the primary objects of these six operations of war, they are denied material protection from injury thereunder.

As far as the aerial bombardment is concerned, the various attempts made to protect non-combatants could not prove much fruitful. Before the Second World War treatment of an entire city as a military objective demand was contrary to the principles of Intenational Law. During the Second World War throughout the war, explosive bombs, incendiary bombs and projectiles were used over civilians.

"International Law had always made non-combatants the indirect victims of sleges, blockades and other military operations and held them to direct responsible for the indemnities exacted from the defeated State. *Grotius* had stated the principle clearly that the subjects of enemy States were themselves individually enemies ; and the numerous efforts made during the nineteenth century culminating in the Conventions of the Hague Conference of 1907

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seeking to spare the non-combatants as far as possible from the effects of war all proceeded upon the principle that they were technically enemies in their individual capacity. Unhappily as war become more and more totalitarian the distinction between combatants and non-combatants practically disappeared, armies and civilian populations becoming involved in a common fate."

Q 16. What are the prohibited means of warfare ? In this connection dwell also upon the legality of nuclear weapons.

A. **Prohibited means of warfare** —The belligerent is entitled to kill or adopt any means of killing the combatants except those which are prohibited. The prohibited means are :—

Poison —Poison or poisonous weapons are prohibited means according to Hague Regulations.

Projectiles and Flaming Projectors —These are not permissible The German flaming projectors which threw burning liquid on enemy combatants in Second World War were unlawful.

Treachery.—The Hague Regulations prohibited treacherous ways of killing or wounding.

Explosive Bullets and Dum Dum Bullets.—The Declaration of St Petersburg of 1868 which was signed by seventeen States prohibited the employment of any explosive projectile weighing less than 14 ounces. The First Hague Conference forbade the use of Dum Dum Bullets which expand and flatten easily in the human body.

Asphyxiating or deleterious gases.—The Hague Conference of 1899 prohibited the use of projectiles for diffusion of asphyxiating and deleterious gases. This prohibition was recognized by the Treaty of Versailles and was repeated in the Treaty of Berlin of 1921 between the United States and Germany and the Treaty of Washington 1922. The Protocol of 1925 signed by leading Powers accepted this prohibition and also forbade the use of bacteriological methods of warfare.

Aerial Projectiles.—According to a declaration of the First Peace Conference of 1899 the launching of projectiles and explosives from baloons and other kind of aircraft was prohibited for five years. The Second Peace Conference of 1907 extended the period of this prohibition up to the close of Third Peace Conference which has not yet been convened. The Second Hague Convention was signed by only a few States and was ratified by many States till the First World War broke out. The result was that the rule of prohibition as to the launching of projectiles and explosives was not observed.

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Protocol of 1979 attached to the Geneva Convention of 1949 prohibits the use of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injuries or unnecessary suffering. This protocol was adopted by the General Assembly in 1980.

Legality of nuclear weapons.—The two new weapons of destruction used in the Second World War were the V-Bombs and the atomic bombs. The V-Bombs were fired by Germany from bases on coast of Holland against London and other British cities while the atomic bombs were dropped on Japanese cities of Hiroshima and Nagasaki in August 1945 by the United States. The doubtful legality of the V-bomb lay in the fact that of its very nature it could not be aimed with accuracy against its proper target, and that the speed with which it came made it impossible to give warning to the inhabitants of the city to take shelter. On the other hand, the doubtful legality of the atomic bombs consisted in the fact that the range of its action and its distructiveness were so great as to make it impossible to observe the restrictions upon the bombardments of undefended cities. [*Fenwick*—International Law (3rd Ed.) p. 559].

U. S. A. has justified the legality of atom bomb attacks on Nagaski and Hiroshima as ;—(a) A reptisal, although the casualties inflicted were quite out of proportion to those caused by single instances of illegal air bombardments committed by the Axis Powers. (b) As terminating the war quickly and thereby saving both Allied and enemy lives which would be equivalent to relying on the doctrine of military necessity. None of these grounds find any support in international jurisprudence. The provisions of the Declaration of St. Petersburg of 1868 forbidding the employment of weapons which uselessly aggravate the sufferings of disabled men or render their death inevitable and of the Protocol of 1925 prohibiting use of asphyxiating and deleterious gases as also of "all analogous liquids, materials or devices" and bacteriological methods of warfare cannot justify the use of the atomic bombs for the simple reason that the atomic bombs that were dropped in Japan in 1945 had a wide range of the destructive action and inflicted protracted suffering on human life.

Q. 13 Write short notes on :

(a) Prisoners of war ;

(b) Treatment of wounded and dead ; [I.A.S. 1977].

(c) Protection of Civilian persons in time of war ;

(d) Espionage ; and [I.A.S. 1977, 1967].

(e) Guerrillas. [I.A.S. 1977].

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A. (a) **Prisoners of war.**—According to Article 4 of the Geneva Convention of 1949, the following categories of persons who are captured by the enemy are treated as prisoners of war :—

(1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces ;

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps. including such organized resistance movements, fulfil the following conditions :—

(a) that of being commanded by a person responsible for his subordinates ;

(b) that of having a fixed distinctive sign recognizable at a distance ;

(c) that of carrying arms openly ; and

(d) that of conducting their operations in accordance with the laws and customs of war ;

(3) Members of regular armed forces who profess allegiance for a government or an authority not recognized by the Detaining power ;

(4) Persons who accompany the armed forces without actually being members thereof, as civil members of military aircraft crew. War correspondents, supply contractors, members of labour units. or of service, responsible for the welfare of the armed forces, provided that they have received authorisation for the armed forces which they accompany, who shall provide them for that purpose with an identity card ;

(5) Members of crew, including masters, pilots and apprentices of the merchant marine and the crew of civil aircrafts of the parties to the conflict, who do not benefit by more favourable treatment under any other provisions of International Law.

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

As regards the treatment of prisoners of war, please see Question No. 17.

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(b) Treatment of wounded and sick.—Please refer to Question No. 18.

(c) Protection of Civilian Person in time of war.—Please refer to Question No. 18.

(d) Espionage.—Though International Law permits espionage in the war, yet it provides for the punishment to those who are caught or apprehended while spying. The general practice of the State is to punish spies on their arrest. But the Hague Rules provide that before awarding punishment to the spies, they should first be tried and should be given sufficient opportunity to disapprove the charge against them. These Rules further provide that if the spy escapes and again arrested, he should be treated as prisoner of war. In America, no distinction is made between men and women spies in regards to the punishment.

(e) Guerrillas.—Under the revised Red Cross Conventions 1949, the guerrillas have been given the rights and status of prisoners of war. The conference for the revision of the Red Cross Convention 1949 was held in April 1977, which was ratified by 66 States.

Q. 14. Distinguish between 'strategem' and 'deceit' as understood in the law of war. To what extent is either of these legitimate ? Illustrate your answer by examples. (I.A.S. 1952 ; 1967).

A. Stratagem and Deceit.—According to *Oppenheim*, "Rules of war or stratagems are deceit employed in the interest of military operations for the purpose of misleading the enemy." Deceit may be defined as the employment of treacherous means for betraying the confidence of the enemy.

A distinction may be made between stratagem and deceit. A stratagem is permissible under international law while perfidy or deceit is not. If a belligerent is under a moral obligation to speak the truth to the enemy, it is perfidy to betray the confidence. The assassination of enemy commanders, soldiers or heads of States are treacherous. The same is the case with the feigning or surrender to rule the enemy into trap, or the use of flag of truce or the Red-Cross of the Geneva Convention. A stratagem can be met by stratagem and a belligerent cannot complain of the enemy who deceives him in return. If a spy of enemy is bribed to give wrong information to his employer and the spy deceives the briber there is no perfidy.

International Law permits belligerents to employ ruses of war of stratagem to mislead the enemy. The Hague Regulations prohibit the improper use of ruses of war. The ruses consist in the employment of deceitful means by a belligerent for the purpose of misleading the enemy. The making of military operations by means of false

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marches or creation of batteries, the feigning of attacks or fights; the use of feigned signals and bugle calls, the use of enemy watch word, dissemination of deceitful intelligence are some of the ruses of war or stratagems.

Deceit is not permitted by international law. The Hague Regulations forbid killing by treachery. The use of national flag of the enemy is forbidden during actual attack. The improper use of ruses of war amounts to treachery and a belligerent is forbidden to make such a use.

CHAPTER XXV

BELLIGERENT OCCUPATION

Q. 15. Discuss the rules of International Law in regard to enemy occupation. Illustrate yoor answer by reference to some justified and anjustified event in the two World Wars.

Explain the main principles of the law of belligerent occupation of enemy territory. (I.A.S. 1973, 1970, 1962, 1960, 1956, 1955, C.S.E. 1983, P.C.S. 1976).

A. Belligerent Occupation.—During the war, each belligerent tries to occupy the territory belonging to the other belligerent and belligerent occupation constitutes an important success in warfare. According to the Hague Regulations, a territory is regarded to be in belligerent occupation when it is 'actually placed under the authority of the hostile army'. It is essential that a belligerent occupying the territory of the other belligerent must establish its administration over the occupied territory and exclude administration by the legitimate government. Belligerent occupation ends as soon as the occupying belligerent forces withdraw or are driven out.

On occupying enemy territory, the occopying belligerent becomes entitled to certain rights under the International Law. The Hague Regulations made a clear statement of the law on the subject. After the Second World War, the Geneva Convention of 1949 adopted some more rules governing belligerent occupation of enemy territory.

Authority of Belligerent Occupant.—The Hague Regulations provides that as soon as the authority of the legitimate Government is actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force of the country. The belligerent is under an obligation to maintain the existing civil and criminal law in so far as was compatible with the existence of a state of war

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and the safety of the army of occupation. Such new measures as might be enacted in accordance with the necessities of the abnormal stuation, possess in respect to the citizen body the force of law, and their observance might be secured by the imposition of such penalties as the occupant might think proper. While the Hague Regulations forbade the occupant "to compel the population of occupied territory to take an oath of allegiance to the hostile power," he might demand for the inhabitants the same obedience and temporary loyalty to which their lawful sovereign was entitled. The occupant has a duty to respect existing laws of the territory and to maintain law and order in accordance with the Hague Regulations. Further, "the lives of individuals" and "family honour and rights", as well as "religious convictions and freedom of worship" must be respected. The inhabitants may be required to serve as drivers and ferrier ; they may be forced to bury the dead, remove the sick and the wounded to bring supplies, stores and baggage. The occupant can ask the inhabitants to render service in the repairs of the bridges, roads, buildings and other works damaged by military operations and necessary for the administration of the occupied territory. But on no account can the inhabitants be asked to take part in military operations. The Hague Regulations forbade the belligerent "to compel the nations of the hostile party to take part in the operations of the war directed against their own country". The Geneva Convention of 1949 also prohibits the occupant to compel inhabitants of the occupied territory to serve in its armed or auxiliary forces and to carry on propagands for voluntary enlistment of his army.

The belligerent occupant has no right to deport the inhabitants outside the occupied territory and compel them to work there.

The inhabitants are bound to respect the authority of the occupant. They are liable to be punished by the occupant for acts which amount to 'war treason', espionage, supplying information to enemy, aiding prisoners of war to escape, conspiracy against the occupant forces, intentional misleading of troops while acting as guides, are some of the instances of 'war treason'.

Taxes and other fiscal measures.—The Hague Regulations has imposed certain restrictions on the power of the occupant to collect taxes, revenues, and other dues. The occupant could collect taxes etc. in accordance with the rules of assessment.

Dealing with property.—The belligerent has to respect private rights in the property and has no right to confiscate private property. The Hague Regulations followed customary law in forbidding the confiscation of private property, as well as 'pillage' ; but they appeared to go beyond customary law in requiring that private property must be respected, unless the latter phrase could be inter-

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preted to permit the taking of private property by way of requisition and contribution." [Fenwick—International Law (3rd Ed.) p. 571]. Israel has claimed in 1979 the right to take oil resources from the occupied territories for both military purposes and for the needs of Israel's domestic economy. None of the rules on property right in the Hague Regulations of 1907 permit the taking of oil resources without compensation for the domestic economy of the occupying power.

Hostages.—The Hague Regulations do not prohibit the taking of hostages by belligerent occupant for the purpose of enforcing compliance with legitimate orders of the occupant. "Nor does Article 50 clearly prevent an occupant from taking hostages to safeguard line of communication threatened by guerillas not belonging to the armed forces, or for other purposes, provided that he does not kill them, although they may suffer for acts or omissions of others for which they are neither legally nor morally responsible." [Oppenheim—International Law Vol. II (VII Ed.) p. 445]. Hostages are generally taken to prevent the commission of unlawful acts by enemy forces or the inhabitants of the occupied territory.

Collective responsibility for acts of individual.—The rule of holding the community collectively responsible for the acts of individuals and imposing fines upon it as a means of preventing offences, such as the destruction of railways, telegraph lines and bridges was well established in principle, though of course it was very much abused. The Hague Regulations provided that "no general penalty, pecuniary or otherwise, can be inflicted on the population on account of its acts of individuals for which it cannot be regarded as collectively responsible," but as Fenwick observes, the phrasing of the regulation was in such vague terms as to leave it uncertain whether the community might or might not be "regarded as collectively responsible" for acts which its co-operation would help greatly to prevent and which it might, therefore, be held to permit impliedly by not preventing.

Requisition.—The occupant is entitled to demand requisitions in kind and services from the inhabitants of the occupied territory for the needs of the army of occupation. These requisitions are to be "in proportion to the resources of the country and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country." [Fenwick—International Law (3rd Ed.) p. 572]. Under the Hague Regulations, every commodity necessary for the maintenance of the army such as fuel, food stuffs, clothing, tobacoo, printing presses, type, leather and other things can be requisitioned.

Practice during the First World War.—The violations of the

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Hague convention in respect of military occupations were so general during the First World War that there appeared to be little left of its provisions when the war came to a close. The German army while invading and sweeping through neutral Belgium applied and interpreted rigorously the principle of collective responsibility of the community for the illegal acts of the indviduals. Hostages were taken and in many cases executed ; heavy fines were imposed upon towns and villages in punishments of acts committed by individuals. Deportation of men and, in some cases, of women from occupied territory was forced upon and they were made to work in factories and mines of the enemy. The occupied territory was also forced in to provide for food and other supplies of the occupied territory in excess of and without reference to the needs of the army of occupation.

Practice during Second World War.—During the Second World War wider areas were covered with military occupation by the Germans and later by allied armies than were covered in the First World War. On the part of the German army, hostages were taken even more freely than in Belgium in 1941 ; larger numbers of hostages were executed, villages such as Lidice, were completely wiped out in reprisal for alleged unlawful acts within their areas. The Germans also deported inhabitants of occupied territory and forced them to work under conditions of cruelty and suffering The Military Tribunal at Nuremburg found that at least 5,000,000 workers were deported to serve in German industrial concerns and inhumanely treated. This deportation for forced labour was considered to be a war crime and those who were found guilty of such a crime were punished. Requisition also went to the limit of available resources during the local population to the verge of starvation. The atrocities committed by Germany during its occupation of enemy territories aroused nations to define and develop the rules governing belligertnt occupation and the result was the adoption of the Geneva Convention of 1949.

CHAPTER XXVI

LAWS OF MARITIME WARFARE

Q. 16. Write a short essay on Warfare on the sea Point out in your essay the violations, if any, of the rules in two World Wars.

A. The laws of maritime warfare are contained partly in the rules of customary International Law, partly in the Declaration of Paris of 1856, partly in the Hague Convention of 1907, partly in the London Submarines Rules Protocol of 1936 and partly in the Geneva Convention of 1949. Following are the main laws of maritime warfare :—

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Attack on and seizure of ships.—Attack on and seizure of ships belonging to enemy constitute principal means of maritimes warfare. Men of war and public vessels on the open sea or in the territorial waters of either belligerents are to be attacked when they resist a visit by the enemy men of war. The attacked vessel is allowed to defend by making a counter attack. Privateering is illegal. Merchant vessels may be lawfully converted into warships, provided according to the British practice that the conversion is effected in a British port and not while the vessel is at sea or in a neutral port. During the First World War, the Allied powers began the practice of arming their merchantmen for purpose of defence. This led to a lot of controversy, inasmuch as many writers maintain that private armed vessels do not lose their legal character while there are writers who are of opinon that by being armed the private vessels lose their immunities.

When a vessel attacking or attacked hauls down its flag indicating surrender she must be given quarter and seized.

Submarine contract Mines.—The Hague Convention VIII requlates the laying of automatic submarine contract mines. The Convention lays down that belligerents must not lay automatic contract mines off coasts and ports of the enemy with the sole subject of intercepting commercial navigation and belligerents should take all possible care to ensure security of peaceful shipping and to render these mines harmless within a limited time. The Convention prohibits laying of unanchored automatic contract mines unless they are so constructed as to become harmless one hour at most after those who laid them have lost control of them.

The failure of Russia to sign the Convention rendered it inapplicable in the World War. Both in the First and the Second World Wars, there was complete disregard of the prohibition of this Convention on the part of Germany which indiscriminately made use of the contract mines. This improper action of Germany was met with the establishment of permanent minefields and war zones on the part of the other belligerents. The use of 'electromagnetic mines' by Germany in the Second World War made navigation of belligerent as well as neutral ship more dangerous.

Seizing vessels and their effect.—When a belligerent-of-war seizes a vessel of the enemy, it either sends some of its officers or crew on board the seized vessel or directs the seized vessel to lower its flags and to follow it.

The effect of seizure differs in the case of private enemy vessels and public enemy vessels. Seizure of private enemy vessels may be described as parallel to occupation of enemy territory in land warfare. On the seizure of private enemy vessel, the individuals

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and the goods on the vessel as well as the vessel becomes subject to the authority and the discipline of the capturing belligerents. On the other hand, the effect of seizure of public enemy vessels is their immediate and final appropriation. They may be taken either into a port, or atonce destroyed.

In the case of the seizure of public enemy vessel, the capturing belligerent has the right to make immediate appropriation. The seized vessel may either be destroyed or taken into port. All individuals on the vessels are taken as prisoners of war. The cargo is also taken to be confiscated. According to the British practice, neutral goods on such vessels are also liable to be appropriated but American practice forbids appropriation of neutral goods.

Exceptions.—The Hague Convention prohibits seizure of vessels with a religious, scientific or philanthropic mission or hospital ships. Similarly, the Hague Convention XI declares that vessels employed exclusively in coastal fisheries and small boats employed in local trade together with their cargo are exempt from seizure by the belligerent. However, it may be noted that there was a flagrant violation of these rules by the belligerent. During the First World War Germany did not follow these rules.

Bombardment of coastal towns.—Under the Hague Convention IX, the bombardment of coastal ports and towns which are undefended is prohibited unless the local authorities refused to comply with a formal requisitioning demand for provisions and supplies. This rule of International Law was violated by Germany during the First World War. A number of British coast towns were bombarded by German naval forces, without warning. During the Second World War, there was still greater violation and the provisions of the Convention disappeared from sight.

Postal correspondence of belligerents.—The Eleventh Hague Convention of 1907 provided that the postal correspondence of belligerents "whatever its official or private character may be," with the exception of correspondence destined for or proceeding from a blockaded port was inviciable. But as the Convention was not satisfied it was not observed by the belligerents.

Combatants and Non-combatants —This distinction between combatants and non-combatants is also maintained in the law relating to maritime warfare. Combatants may be killed but not men that are sick or wounded, and those that surrendered must be given quarter.

Non-combatants such as members of the medical unit, chaplains and other persons who do not fight are not to be directly attacked, killed or wounded.

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Treatment of sick, wounded and ship-wrecked.—The sick, wounded and ship wrecked individuals are to receive humane treatment. When they fall into the enemy hands they are made prisioners of war and meet such treatment as is given to prisioners. The belligerents have a duty to make a search for the dead, the wounded and the sick and to see that proper arrangement is made for their treatment.

Ruses in sea warfare.—Ruses not involving perfidy are allowed in sea warfare as in land warfare. Customary International Law permits the employment of a false flag whether enemy or neutral for the purposes of misleading the enemy. But before the actual attack the vessels must fly its real flag. The act of showing signs of distress is not permissible as it involves perfidy and takes the enemy unawares.

CHAPTER XXVII

LAWS OF AERIAL WARFARE

Q. 17. Write a short essay on "Aerial Warfare". Comment upon the statement that 'during the Second World War (1939-1945), the rules of air warfare were broken by all the belligerents'.

Or

Discuss the rules of aerial warfare, and in this connection dwell on the property of the use of (a) Flying Bombs used by Germany and (b) the atom boms used by the U.S.A. (I A.S. 1953).

A, The Laws of Air Warfare.—The only rules that existed before the first World War were embodied in the Hague Declaration and the Hague Regulations. A need for a systematic body of rules for aerial warfare was never more felt than during the First World War in which aircraft proved to be a very useful means of warfare both on the land and tha sea. The question of regulation for the use of aircraft in war was taken up at the Washington Conference of 1922 on the limitation of Armaments. A Commission of Jurists was appointed by that Conference for formulating rules of Air Warfare. In 1923, the Commission which met at the Hague presented a Code of Air Warfare Rules known as the Hague Air Warfare Rules. Although these rules have not been ratified and have not so far been incorporated in a multi-partite agreement, they embody valuable principles on which the law as to aerial warfare can be safely based. Moreover, States often refer to these rules in their arguments on questions relating to aerial operations.

Aerial attack.—The Hague Air Warfare Rules do not prohibit the use of tracer, incendiary or explosive projectiles by or against aircraft. It will thus appear that the use of incendiary and explosive

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projectiles which is prohibited in land warfare is permissible in aerial warfare. In air warfare, an attack on a disabled aircraft or on the individual with a crashed aircraft is not prohibited. But occupants of disabled aircraft, when attempting to escape by means of parachutes, must not be attacked in the course of their descent. The principle of immunity of non-combatants from attack applies to aerial warfare as it does to land warfare.

Aerial Bombardment —The Hague Air Warfare rules prohibited aerial bombardment in following ways :—

(a) Aerial bombardment for terrorising the civilians and for destroying and damaging private property of non-military character and for injuring non-combatants is prohibited.

(b) Aerial bombardment for enforcing acquisition and contribution is prohibited.

(c) It is lawful to direct bombardment of military objectives e. g , militarv forces, military works, military workshop, military establishments or depots, factories, engaged in the manufacture of arms, ammunition, military supplies, lines of communication or transportation used for military purposes.

(d) Bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited.

(e) Buildings dedicated to public worship, art, science or charitable purposes, historic monumsnts, hospital etc. are not to be bombarded.

The Assembly of the League of Nations in 1938 adopted a resolution whereby three principles enunciated by the British Delegation were accepted :—

(1) Deliberate bombardments of civil population is unlawful.

(2) Targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.

(3) Reasonable care must be taken in attacking military objectives so that by carelessness a civil population in the neighbourhood may not be bombarded.

International Convention for Protection of Cultural Property, 1954 also emphasised that during aerial warfare cultural building and property connected with it should not be destroyed.

It is of immense importance that aerial bombardment may be

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so directed as not to endanger the civil population. In the Second World War, while it was recognised that aerial bombardment was an effective means of air warfare, it was declared by Great Britain and other States that, bombardment was to be directed against strict military objectives in the narrowest sense of the world' and that civil population was to be saved at any cost. Germany too agreed to this principle but her indiscriminate air bombing of Warsaw clearly showed that she could not adhere to this policy. Retaliatory measures taken up by Great Britain led her also to deviate from this rule and she did not confine her aerial bombardment only to 'strict military objectives in the narrowest sense of the word'.

Attack and capture of Civil Aircraft.—The Hague Air Warfare Rules permit the firing of belligerent non-military aircrafts unless they make the nearest available landing on the approach of enemy military aircraft.

The Hague Rules further permit firing upon civil aircraft which fly within the enemy territory or in the immediate vicinity of the military operations of the enemy either on land or sea.

Enemy civil aircraft and goods carried by them are liable to be captured. The practice of several States including Great Britain recognises this rule of capture.

Violations of Air Warfare–Rules during Second World War.—During the Second World War all rules of legitimate warfare were thrown to winds. The rules of air warfare were broken by all the belligerents. A few instances of such violations will show the truth of the statement.

Insprite of American President's appeal and England and France joint Declaration of September 2, 1939, to spare the civilian population by aerial bombardment, Second World War witnessed an utter disregard of rules of aerial warfare. The whole war was fought without any regard for the rules of the aerial warfare and non-combatants were mercilessly killed and buildings devoted to public worship, art, religion, and historical monuments were bombarded. To cap all this savagery, came the use of atom bombs by America on the Japanese cities of Hiroshima and Nagasaki on August 6 and 9, 1945. without giving due warning of danger to non-combatants and inspite of the protest of many of the scientists who had worked on the project. These two atomic bombs caused untold and unforeseen miseries to civilian population.

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CHAPTER XXVIII

PRIZE COURTS

Q. 18. State briefly the nature, functions and scope of Prize Courts. What law do they administer ?

Are the orders in council binding on the British Prize Courts ? (I.A.S. 1950).

Or

Explain the nature and function of the Prize Courts. Examine the desirability and practicability of establishment of an International Prize Court. (P.C.S. 1960).

A. Prize Courts.—Prize consists in property such as ships, goods and other articles captured *jure belli* on sea or foreign port or captured on land by naval forces. The Courts existing for deciding cases of prizes are called Prize Courts. Prize Courts are established for the determination of the validity of maritime captures during war. "With the aid of its Prize Courts a belligerent fulfils its obligation to neutral States and their nationals to adjudicate as to property of the seizure of vessels and cargoes in which they claim an interest and as to the right to appropriate what has been captured."

Nature of Prize Courts—Prize Courts are National Courts deriving their jurisdiction from the laws of a State and they are not international courts In the case of *Zamroa.* [The Zamora (1916) 2 A. C. 77] the Privy Council held that the British Prize Courts were Municipal Courts and their decrees and orders owed their validity to Municipal law *Hyde*, observes that "the power of a particular court to exercise jurisdiction in a prize case depends upon the local laws, and in the United States, upon the Constitution and the appropriate Acts of the Congress."

Although Prize Courts are National Courts they have an international character inasmuch as they determine the question whether the capturing belligerent or the neutral States have acted according to the rules of international law and thus are open to all persons, irrespective of their nationalities having an interest in the captured vessel or goods. Prize Courts, though national in the sense that they own their existence to municipal laws, are different from ordinary municipal courts. *Wheaton* observes : "The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent either expressed by his voluntary bringing the suit or implied by the fact of his bringing his person or property within the territory."

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Jurisdiction of Prize Courts —The jurisdiction of the prize courts is derived from the belligerent State which established it. The prize court has exclusive jurisdiction to try all cases arising from the act of seizure of a belligerent. Not only has the prize court to determine about the validity of a capture but also other incidental questions.

Procedure of the Prize Courts.—International Law does not contain rules or procedure which prize courts have to follow. Since prize courts are established by belligerent States, they are bound to follow the procedure laid down by enactments to which they own their existence. Every State which is under a duty to establish prize courts has a right to prescribe the procedure of its prize courts.

Law applied by Prize Courts.—A prize court created and maintained by a single territorial sovereign is necessarily a domestic tribunal. The law enunciated and applied regardless of its nature or origin is essentially the local law, because it obtains where the court sits.

Zamora —[(1916) 2 A. C 77]—The leading case on the point is that of S. S. Zamora. It was held in this case that the law which the prize courts administer is not the national or the municipal law but the law of nations.

According to Oppenheim, Prize Courts are not International Courts, but national courts instituted by Municipal Law. Every State is, however, bound by International Law to enact only such statutes and regulations for its Prize Courts as are in conformity with International Law. A State may, therefore, instead of making special regulations, directly order its Prize Courts to apply the rules of International Law, and it is understood that, when no statutes are enacted or regulations are given, Prize, Courts have to apply International Law."

In the order that the decision of a Prize Court may be respected by foreign powers, it is necessary that it should be rendered in accordance with the recognized principles of International Law.

Establishment of an International Prize Court.—Lawrence says that the very fact that the Prize Courts are national Courts points to a grave defect. By means of them belligerents become practically judges in their own cases There is no need to attribute a conscious partiality to the able men who occupy the seats of judgment in them, but unconscious bias can hardly fail to be there. In order to remedy these defects it is desirable to establish an International Prize Court. That an International Prize Court is needed cannot be doubted or denied but there are practical difficulties in the

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way. The most serious difficulty that lies in the way of establishment of such a Court is the absence of an agreed code of maritime law. The existing prize law which can be gathered from the practice of various States, writings of jurists and the decisions of Prize Courts of the world must first be studied and a complete code based upon agreement of the States should be prepared. After it is done, International Prize Court can easily be established.

CHAPTER XXIX

POSTLIMINIUM

Q. 19. Explain briefly the doctrine of Postliminium.

Or

What is the Scope of the doctrine of postliminium ? Refer to leading cases (I.A S. 1953).

A. Postliminium.—The Roman doctrine of *jus postliminium* has been adopted in International Law and is employed to mean that persons, property and territory captured by an enemy are presumed to revert to their former condition on the withdrawal of enemy control "The doctrine of *postliminium* signifies broadly that the mere possession in the course of war of property or territory of the enemy does not suffice, generally, to transfer title or sovereignty as the case may be, as against the enemy owner or sovereign which regains possession during the conflict. It doubtlessly emphasizes the fact that the rights of that owner or sovereign as such are suspended rather than destroyed by temporary loss of possession." *Hyde*—International Law, Vvl. III, p. 2419.

Effect on movable property.—The *Jus postliminium* would require that movable property taken on land would revert to its former owner if it is identified and speedily recovered But public movable property can only be seized if it is required for use in military operations. Should such property be found unused, after the withdrawal of the enemy, it reverts to the State to which it belonged.

Effect on immovable property —The doctrine of *Jus postliminium* applies to immovable property belonging either to the State or to the private persons. Immovable property belonging to private persons cannot as a rule be appropriated by the belligerent occupant. It can only be used by him. If the occupant illegally appropriate such property the private owner can claim it back on the withdrawal of the enemy. The occupant can only enjoy the usufruct of the public immovable property and therefore, no question of reversion arises after he has left the territory.

Effect on territory and Sovereign.—On the termination of the

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occupation, the authority of the legitimate sovereign is restored and the territory comes back under the control of the legitimate government.

Effect on acts done during occupation —All legitimate acts done during occupation remain valid and cannot be undone after the enemy has withdrawn. "Therefore, if the occupant has collected ordinary taxes, has sold the ordinary fruits of immovable property, has disposed of such movable property as he was competent to appropriate or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory." (Oppenheim International Law, Vol. II, P. 618).

But acts done by the occupant in excess of rights are wholly annulled on the withdrawal of the enemy control over the territory.

Applicability of the doctrine.—The doctrine applies only where the acts of the occupant are in excess of his rights. It would appear that legitimate action taken by the occupant is not subject to the doctrine of *Jus postliminium*. An occupant is permitted by International Law to demand contribution from the inhabitants of the occupied territory either for the needs of the army or for the administration of the territory. The doctrine of *Jus postliminium*, will not apply to contributions Similarly, it will not apply to requisitions or to taxes received by the occupant. The doctrine has no application when a territory ceded to the enemy by a peace treaty or conquered and annexed by the enemy reverts to its former. It does not also apply to a case where the territory which had been conquered and subjugated succeeds in regaining the freedom and becomes a part of the former State.

The case of the Elector of Hesse—Cassel.—It is the leading case on the doctrine. Hesse-Cassel a neutral territory, was during the Franco Prussian War, invaded and ocoupied by the French troops in 1806. The Elector of that State who was driven out had valuable mortgagee rights in considerable landed property in Hesse-Cassel.

In 1813, after Napolean lost power under a treaty of December 2, 1813, the Elector was restored to his domains. The Former Elector having died by this time, his son made a claim to realize his debts on the basis of the doctrine of *Jus postlimintum*. He asserted that Napolean was not within his rights to receive payment of his debts and to give a complete discharge to the debtors.

This claim of the Elector did not succeed and the plea of the applicability of the doctrine *Jus postliminium* was repelled. It was held that conqueror's title was full and complete and the receipt of payment as well as the full discharge given by the Napolean were

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valid and legal and although the domains returned to its former owner the acts done by the conqueror within his rights could not be undone.

CHAPTER XXX

TERMINATION OF WAR

Q. 20. Discuss the modes of termination of the status of war and hostilities. What is the effect of a treaty of peace ? [I A.S. 1973, 1956, P.C.S. 1967]

Or

What are the different modes of termination of war ? State the immediate effects of a treaty of peace. (I.A.S. 1955 and 1956).

A. Modes of termination of war. Following are the modes of termination of war.

(1) Cessation of hostilities.—This mode of termination of war is uncertain, inasmuch as, it is not known what period of suspension is necessary to give rise to a presumption that war has come to an end. *Oppenheim* is of the view that termination of war through simple cessation of hostilities is very inconvenient and in as a rule avoided and that cessation of hostilities does not mark the formal termination of war. As an example of this form of termination of war, *Starke* points out three Geneva agreements of July, 1954 on the cessation of hostilities respectively in Vietnam, Laos, and Cambodia which ended the fighting in Indo-China between Government and *Viet Minh* forces.

(2) Subjugation or conditional surrender.—Subjugation as a mode of termination of war has been defined by Oppenheim to mean, "extermination in war of one belligerent by another through annexation of former's territory after conquest, the enemy forces having been annihilated."

Subjugation may be temporary and may not be end of war. The Allied forces assumed full sovereignty over Germany in 1945, after completely defeating the German forces and displacing the Nazi Government. The Nazi Sovereignty was wholly suspended and the subjugation of Germany, though complete, did not mark the end of war inasmuch as the victors had no intention of annexing the territory permanently. The war terminated on the execution of an instrument of unconditional surrender by the German High Command on May 8, 1945.

(3) Cease Fire.—The term "cease fire" implies cessation of hostilities on the order or request of the United Nations Security

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Council or other international organ. For example, the cease-fire order by the Security Council in respect of Kashmir and on the occasion of the renewal of hostilities between the Netherlands and the Indonesian Republican forces.

(4) **Treaty of Peace.**—The normal end of a modern war is the conclusion of a treaty of peace between the opposing States. This was the mode by which two World Wars came to an end. As a general rule, when the parties to a war desire to enter into a treaty of peace they conclude armistices before entering into formal negotiations. The Hague Regulations define armistices as agreements for temporary suspension of military operations.

"Starke" observes that strictly speaking, an armistice is but a temporary suspension of hostilities, and normally signifies that hostilities are to be resumed on the expiration of the armistice period.

Oppenheim viewed that "unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all movable State property, such as munitions, provisions, arms, money, houses, means of transport, and the like, seized by an invading belligerent, remains his property, as likewise do the fruits of immovable property seized by him. Thus further if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is now-a-days usual, although not at all legally necessary, for a conqueror desirous of retaining conquered territory to secure its cession in the treaty of peace".

5. **By a 'Truce'.**—The term truce has been used in the United Nations practice e.g., the truce established in Palestine in May-June 1948 as a result of action by the Security Council. It is a "less definitive cessation of hostilities than the term "*Armistice.*"

Effect of treaty of peace.—*Oppenheim* describes the effects of a peace treaty thus :—"On the one hand, all acts legitimate in warfare cease to be legitimate. Neither capture of ships, nor occupation of territory nor contribution, nor reqisitions, nor attacks on members of the armed forces or on fortresses, are any longer lawful. If forces ignorant of the conclusion of peace commit such hostile acts, the condition of things at the time of peace was concluded must as far as possible be restored, and compensation must be paid. Thus ship captured must be released, territory occupied must be evacuated, member of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid. On the other hand, all peaceful intercourse between the former belligerents and between their subjects is resumed as before the war. The diplomatic intercourse is restored and consular officers recommence their duties."

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CHAPTER XXXI

WAR CRIMES

Q. 26. What do you understand by 'War Crimes' ? Refer to the latest law on the subject.

Or

Define the term 'War Crimes' (I.A.S. 1957, P.C.S. 1978).

A. War Crimes.—"Violations of the rules of warfare are called War Crimes. General International Law obligates the States to punish their War Criminals and authorises any belligerent State to punish the prisoners of war in its power for having violated the rules of warfare prior to capture. Hence General International Law imposes upon individuals as private persons the obligation to refrain from committing War Crimes and establishes individual criminal responsibility for the commission of such crimes by private person". —[*Hans Kelsen*—Principles of International Law, p. 128]. According to *Oppenheim*, War Crimes are such hostile or other acts of soldiers or other individuals as may be punished or by the enemy on capture of the offender. *Oppenheim's* definition is wide enough to include all hostile acts for which the enemy captor can be punished.

Kinds of War Crimes.—According to *Oppenheim* there are four kinds of War Crimes :—

(1) Violation of the recognised rules regarding warfare committed by members of the armed forces.

(2) All hostilities in armies committed by individuals who are not members of the enemy armed forces.

(3) Espionage and war treason.

(4) All marauding acts. [*Oppenheim*—International Law, Vol. II, p. 567].

To the above War Crimes, may be added the new kinds of crimes against the peace and crimes against humanity which along with other war crimes proper were tried by the Nuremberg Military Tribunal after the close of the Second World War. The crime against peace was an innovation and it consisted in violating the Pact of Paris providing for renunciation of war as an instrument of national policy. Crimes against humanity were murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.

Q. 22. What are the charges framed against high Nazi

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Officials at the Nuremberg Trial ? Explain the jurisdictional basis of these Trials. [I.A.S. 1974, 1966, 1960, 1956 : P.C.S. 1976. 1965].

Or

What were the principal offences, the Nazi leaders were charged within the Nuremberg Trial. (I.A.S. 1949).

A. Nuremberg Trial—Jurisdiction of the Tribunal.—An international Military Tribunal was established at Nuremberg to try the major war criminals of the European Axis countries. The main charges against these accused were that they had committed war crimes, crimes against peace and crime against humanity during the Second world war. Under the leadership of Hitler these accused had committed inhuman attrocities upon the jews. These accused were also charged for having violated the treaty of Versailles, 1919 and the Pact of Paris, 1928. The Tribunal derived its jurisdiction from the Agreement of 1945 and Charter which was attached to the Agreement. It had jurisdiction to try and punish individuals who had committed crimes against peace, conventional war crimes and crimes against Humanity. The Charter authorised the Tribunal to declare any group or organisation a criminal organisation. Article 6 of the Charter invested the Tribunal with "the power to try and punish persons, who were acting in the interest of European Axis countries, whether as individuals or as members of organisations." The following acts were expressed to constitute crimes falling within the jurisdiction of the Tribunal :—

(a) Crimes against Peace.—Namely, planning, preparation initiation of waging of a war of aggression or a war in violation of international treaties, agreements of assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoings.

(b) War Crimes.—Namely, violation of the laws or customs of war including murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

(c) Crimes against Humanity.—Namely, murder, extermination enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, social or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country were perpetrated.

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Twenty-two German and Nazi-leaders together with six organizations were charged with War Crimes stated above before the Tribunal.

Judgment of the Tribunal.—The trial of the major War Criminals before the Nuremberg Tribunal began on November 20, 1945. The hearing of the evidence and the arguments of the counsels appearing for the prosecution and the defence, concluded on August 31, 1946. The Tribunal pronounced its judgment on September 30, 1946. Of the accused Nazi leaders three were acquitted, twelve including one who was tried in absentia, were sentenced to death, three were sentenced to life-imprisonment and the remaining four were sentenced to long term imprisonments.

The Tribunal justified at length the indictment of the defendants for crimes against peace, the planning and the waging of war of aggression. Relying chiefly on the Kellogg Briand Pact, the contracting parties condemned recourse to war and denounced it as an instrument of national policy, thus making war an illegal act. The argument that there could be no punishment of crime without a pre existing law *nulla poena sine lege* was dismissed as inapplicable to the existing facts since the defendants must have known that they were acting in defiance of all International Law when in complete deliberation they carried out their designs of invasion and aggression.

It was also submitted on behalf of the defendants that International Law is concerned with the action of sovereign States and provides no punishment for individual and further that the defendants were acting in pursuance of higher orders and that they might plead *respondent superior*. The Tribunal rejected both these submissions. As for the former submission they observed ; "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced." The plea of *respondent superior* was held inapplicable in the case of acts condemned as criminal by International Law, although that factor might be taken into account in mitigation of the punishment.

Q. 23. Estimate the importance of the Nuremberg Trial in International Law.

A. Importance of the Nuremberg Trial in International Law.—(1) The Nuremberg Trial is a decisive turning point in the history of International Law. New principles and new precedents of abiding verecity have been laid down by the Trial. The Tribunal did not adhere to the traditional view that the individuals are protected by the doctrine of State sovereignty and the plea of superior orders did not find favour with the Judges who declared that "Crimes

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against International Law are committed by men, not by abstract entities."

(2) It was for the first time in the history of the Law of Nations that an attempt was made to secure the enforcement of International Law as embodied in the Hague Conventions, Versailles Treaty, Locarno Pact of 1925 and the Pact of Paris 1928. The trial was thus instrumental in mitigating to a certain extent the 'weak and ineffective' character of International Law.

(3) Again, as H. L. Stimson rightly remarks, the trial has affirmed the simple principle of peace that the man who resorts to an aggressive war is a criminal, thus enabling the humanity to move onward to a world of law and peace. This precedent will certainly deter, any would be aggressor, to act like Hitler and Mussolini.

(4) The trial has also given a strong impetus to the progressive development of Law and its codification. Several important principles of International Law concerning the preparation of war, belligerent occupation, execution of hostages and treatment of prisoners were enunciated by the Tribunal in course of the trial.

(5) Finally, it may also be noted that though the trial has secured the outlaying of war of aggression, it also laid down an unhappy precedent that "Victors punish the vanquished" which does not augur well for the future. It is somewhat symbolic of that age when might was right and when the might of the sword determined the length of the sway.

Q. 24. 'Law of Nations prescribes no penalties for offences against international morality or the sanctity of treaties'. In the light of this statement how far do you think the Nuremburg Trials were justified ?

A. The statement amplified.—International Law does not prescribe penalties for offences against morality and sanctity of treaties ; in fact, international law cannot do so. This deficiency is inherent in the very nature of it. An act against morality cannot be made a basis for punishment unless and until such act amounts to illegality which is declared punishable. Morality is a very vague term. The conception of morality is always a relative one and differs from place to place and from time to time. And so, to make immorality as the basis of punishment is to introduce the element of vagueness and uncertainty in the field of law which is always required to be definite and certain. Morality can be a basis or an ideal of law but certainly it cannot be the substitute for law. It is true that as the civilization advances, the law tends to assimilate in it more and more rules of morality. but so long as the moral princi-

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ples are not embodied or converted into rules of law any offences against morality is not a crime and hence not justiciable. Law is, no doubt, "public conscience" (*Hobbes*) but it is the public conscience transmuted into discernible law.

Treaties are made on the sacred understanding that they should be acted upon. But their binding forces go no further. This binding force is not absolute and imperative but depends on the good-will of the parties to ensure their observance. Treaties are not contracts entered into by private individuals and enforceable through the law-courts ; there is no court to enforce the treaties compulsorily The doctrine of '*pacta sunt servanda*' (pacts should be respected) is more of ethics than law and it, in no way, ordains that treaties are absolutely binding. The doctrine of *rebus sic stantibus* is always there to counteract the moral forces of the above doctrine. And so it can safely be said that international law does not prescribe penalties for contravention of treaty obligation. The only redress against such contravention is reprisal or, in the extreme case, war.

International Law prescribes punishment for offences termed as "war crimes". As war-crimes do not include offences against morality and contravention of treaties, as such, it is a truism to say that international law does not prescribe penalties for offences against morality and sanctity of treaties.

Justification for Nuremberg Trial.—Having elaborately discussed the statement, now we should try to test the justification of the Nuremberg Trial. The legality or otherwise of the Nuremberg Trial can be discussed under following two heads :—

(A) Offences against morality, and

(B) Offences against sanctity of treaties.

(A) Offences against morality.—The Nazi war-criminals were tried under three counts and one of them was "crimes against humanity" which may be taken as analogous to "offences against morality". The criminals were accused of murder, extermination, enslavement, deportation, and other inhuman acts against civilian population, before or during the war, and persecution on political, racial and religious grounds. The trial of the accused for these acts was perfectly justified because all these acts mentioned here fall under the traditional categories of war crimes and hence punishable, and not because of their being immoral acts simpliciter.

(B) Offences against sanctity of treaties.—The prosecution relied too heavily in the Pact of Paris of 1928 which enunciated renunciation of war as an instrument of national policy. Germany was party to it. It is, however, apparent that an implicit reliance

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should not be placed on it for launching the prosecution of the vanquished leaders because—

(i) The words of the Pact were not of a penal statute. They were the language of theology and not of law.

(ii) Although the Pact declared aggressive was illegal, such illegality could, by no stretch of imagination, be transformed into an international crime so as to make each individual participant liable for the same.

(iii) The Pact, from ever since its inception, was followed in breach till one fine morning the Allies decided to base the prosecution of the vanquished leaders and generals on it. In 1939, Japan invaded Manchuria but not a little finger was raised for punishing the recalcitrant. In 1939, Italy invaded Abbyssinia but no action was taken under the Pact. There are numerous such examples The Pact was dug out from the lumber-room only when it was thought convenient for the victorious powers to set out on the trial of the Nazi Leaders.

Conclusion.—So we see that the trial was justified under the head '(A)' as explained above, and unjustified under the head '(B)'. But on the whole, having consideration of other factors which are not dealt with here, the Nuremberg Trials were unjustified. The trials were actuated by the motive of wrecking vengeance against the vanquished German leaders and not by the desire of bringing the offenders to justice. It was a persecution and not prosecution of the defeated leaders. Whatever have been the high considerations for such trials, they were unjustified in the eyes of law and natural justice.

Q. 25. Writ short notes on .—

(a) Tokyo Trial. [I. A. S. 1974, 1966, 1956, P. C. S. 1976].

(b) Taking of Hostages.

(c) Genocide. [P. C. S. 1973].

A. (a) Tokyo Trial.—This trial, also proceeded on the principles of the Nuremberg Trial. The Tokyo Trial started hearing on June 4, 1946 and was presided by Sir William. The Charter of the International Military Tribunal for the Far East classified the crimes into three groups, namely, crime against peace, conventional war crimes and crimes against humanity together with separate crimes of conspiracy. The Tribunal consisted of eleven judges representing States.

This trial, also proceeded on the principles of Phillipine

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Islands. There were twenty-eight accused against whom different charges were put forward by the eleven States. The various charges were in respect of conspiracy for the domination of East Asia, Manchuria and China, waging an illegal war, conspiracy with Germany and Itlay, murder of the people of the prosecuting States, armed attacks in violation of General International Law and of treaties, inhuman teeatment of prisoners of war and other conventional war crimes. The trial commenced on June 4, 1948. Some of the accused were sentenced to death while others to various terms of imprisonment.

Dissenting judgment.—One of the judges, Dr. Radha Bendoe Pal of India gave a dissenting judgment. He held that the Pact of Paris had not the effect of laying a positive rule of International Law and of making war an international crime.

(b) Taking of Hostages.—The practice of taking as hostages enemy individuals for the purpose of preventing acts contrary to international law still exists. Taking of hostages is resorted to by a belligerent occupant as well as by an army in the field. What is done is that certain enemy individuals of importance are taken in custody of the belligerent in order to bring pressure on the enemy and its citizens to forbear committing illegitimate acts of warfare. The Geneva Convention of 1949 prohibits the taking of hostages.

The General Assembly adopted a resolution on 17th December, 1979 on International convention against the taking of Hostages, which provides as follows :

(1) Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostages') in order to command the third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostages commits the offence of taking hostages,

(2) Each State Party in the territory shall make the offences punishable.

(3) The State Party in the territory of which the hostages are held by the offender shall take all measures it considers to ease the situation of the hostage, in particular, to secure his release and after his release to facilitate his departure.

(4) If any object which the offender has obtained as a result of the taking of the hostages comes into the custody of a State Party, that State Party shall return it as soon as possible to the hostage or the third party, as the case may be, or to the appropriate authorities thereof.

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In the First World War the practice of taking hostages was very much abused. Germany, on the occupation of Belgium in 1914 took hostages and killed them whenever she believed her troops were fired upon by civilian of the occupied territory. The Second World War saw greater abuses in the practice of taking hostages. The International Military Tribunal found that Germany resorted to the practice of keeping hostages to prevent and to punish any form of civil disorder. By seizing of diplomatic staff of American embassy Iran has also violated international law. Inviolability of diplomatic personnel is one of the well recognised basic principles of international law. This principle was well recognised in Vienna Convention on Diplomatic Relations, in 1961, by Iran also.

(c) **Genocide.**—According to *Cooper* the crimes of genocide implies the 'destruction of national, racial or religious groups.' The crime of genocide assumed alarming proportions under the Nazis. They committed the crime of genocide in their attempt to exterminate the jewish race. The recent disturbances in Tibet are considered to be an outcome of the various acts of omission and commission amounting to genocide, on the part of China.

On December 11, 1946, the General Assembly of the United Nations adopted unanimously a resolution affirming that *genocide* was "a crime under international law" for which the perpetrators whether private individuals or public officials were punishable. The member States were invited to enact the necessary legislation and it was recommended that international co-operation be organised to the same end.

The Genocide Convention of 1948 purports to protect the very right of human groups to exist as groups. By a Resolution of December 1900, the General Assembly of the United Nations approved of the establishment of an International Criminal Court for the prosecution of those held guilty of violating the international convention.

PART IV

THE LAW OF NEUTRALITY

CHAPTER XXXII

NEUTRALITY

Q. 26. What do yon understand by the term neutrality ? Set out briefly the development of neutrality from the eighteenth century up to the present time To what extent does neutrality survive under the Charter of United Nations ? [I.A.S. 1954, P.C.S. 1976, 1981].

Or

The experience of two World Wars has shown that the substan-

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tial aspect of the traditional law of neutrality has become obsolete. Discuss.

Or

The adoption of the Charter of the United Nations on June 26, 1945, finally marked the end of neutrality as a system comment. (PCS 1958).

Or

"Neutrality is no longer a legitimate status under the U.N. Charter' Discuss this statement carefully. (P.C.S. 1956).

A The concept of neutrality —According to Oppenheim, 'neutrality is the attitude of impartiality adopted by third State towards belligerents and recognized by the belligerents, such attitude creating rights and duties between impartial States and belligerents.

In the words of Fenwick, neutrality is understood as the beginning of twentieth century might be defined as the legal position of a State which remained aloof from a war between two other States or groups of States while maintaining certain rights towards the belligerents and observing certain duties prescribed by customary law or by international conventions or treaties'.

According to J G. Starke, in its popular sense, neutrality denotes the attitude of a State which is not at war with belligerents and does not participate hostilities. In its technical sense, however it is more than an attitude, and denotes a legal status of a special nature, involving a complex of rights, duties and privileges at international law, which must be respected by belligerents and neutrals alike.

Chief Features of Neutrality —On the basis of the above definitions we may conclude that there are following chief features of neutrality.

1. Neutral State comes into being on the notification of an outbreak of war and lasts so long as war lasts or until war breaks out between the neutral States or either of the belligerents.

2. The neutral status of a State has to be recognized by belligerents. Non-recognition of the status by belligerents amounts to violation of international law.

3. Neutral States are under a duty not to assist actively or passively either belligerent.

4. Neutral States are not precluded from intervening when a belligerent is guilty of violating International Law in carrying on a war.

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5. Neutral States have no duty to abstain from carrying on humanitarian activities such as sending of medicine, doctors and other commodities for the sick and the wounded of the war.

Development of the Modern concept of Neutrality.—It was not until the eighteenth century that it was widely recognized that the neutral States were to remain impartial and the belligerents were under a duty to respect their neutrality. *Bynkershock* discarded the idea of just and unjust war, maintained that a neutral State was a friend of both the belligerents and was not required to decide the question as to which party to a war had a just cause. *Vattel* a Swiss, being naturally zelous in supporting the idea of impartiality described neutral State as those who took no one's part remaining friends common to both parties and not favouring the armies of one of them to the prejudice of the other. Inspite of the fact that in theory as well as in practice the idea of neutrality in relation to neutral States has been recognized, there was no strict compliance of the rule.

In 1780, during the war between Great Britain on the one hand and America, France and Spain on the other, Russia proclaimed what is known as the "First Armed Neutrality" and enunciated five principles :

(1) The neutral vessels should be permitted to be left unharmed in the ports and coasts of the belligerents ;

(2) The belligerents could not seize any enemy goods except contraband goods on neutral vessels ;

(3) That the rule as to contraband contained in the Treaty, existing between Great Britain and Russia, was to be applied in all cases ;

(4) That port were belligerent had stationed vessels should only be deemad to be blockaded ;

(5) That these principles should be applied in the proceedings and judgments on the legality of prizes.

The First Armed Neutrality, besides furnishing a basis for furthrr development, failed to achieve the desired result. Same was the fate of the Second Armed Neutrality proclaimed by Revision in 1800. The Second Armed Neutrality was based on the five principles of the First Armed Neutrality and one more principle to the effect that belligerents would not exercise their right of visit and search neutral merchantman under convoy if a declaration to the effect that the vessel did not contain contraband of war, had been made by the commander of the men of war under whose convoy the neutral vessels were sailing.

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The Second Armed Neutrality did not last long though it led to a compromise between Russia and Great Britain resulting in a Maritime Convention whereby Great Britain recognized the result that the neutral vessels might navigate from port to port, and on the coasts of the belligerents and that there should be an effective blockade.

On the outbreak of war between Great Britain and Russia in 1907 the convention fell on the ground and each party proclaimed its adherence to its original principles. The development of the concept of neutrality was now favoured by other factors, for example for the attitude of impartiality adopted by the United States in Napoleonic wars and the permanent neutralization of Belgium and Switzerland. At the conclusion of the Crimean war came the epoch making Declaration of Paris (1856) which laid down the rule :

(1) That privateering be abolished ;

(2) That neutral flag covers enemy goods with the exception of contraband ;

(3) That neutral goods on enemy vessel are immune from seizure ;

(4) That blockade should be effective. By the end of the nineteenth century neutrality had attained an important position as a legal institution but much was still to be done to secure precision and definiteness in the rules relating to neutrality.

Historical landmarks in the development of the law relating to neutrality in the present century are :—

The Hague Convention of 1907.—The Second Hague Peace Conference, which met in 1907, adopted two conventions directly dealing with neutrality. Convention V dealt with the rights and duties of neutral powers in war on land while Convention XIII regulated the rights and duties of neutral powers in naval war. The strict attitude of impartiality has throughout been maintained in these conventions. As Convention XIII did not resolve all the controversies arising on several questions relating to rights and duties of neutrals in naval war, it was found necessary to call another conference which met at London and produced the famous Declaration of London in 1909.

Declaration of London, 1909.—This was a Code of rules relating to blockade, contraband un-neutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy, resistance to search and compensation. After 1916, the Declaration was not obeyed during the rest of the First World War.

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First World War.—The law relating to neutrality was put to test during the First World War in which all the Great Powers and several other States participated At the outbreak of the War several States which were outside the conflict in the beginning made declarations of their neutrality. Although, United States announced that 'it was on terms of friendship and amity with the contending powers', it could not remain neutral for a long time and has to join war in 1917, when it felt that it was difficult to keep its neutrality intact, against the attacks of both, Great Britain and Germany. A close study of this war, will make it clear that the rules of neutrality so far settled relating to naval warfare proved ineffective and neutrality had come to an end. The laws relating to blockade and contraband were ruthlessly violated and neutrality fell from the high pedestal which it had reached after a long struggle.

The League of Nations—Neutrality under the Covenant of the League of Nations.—The Covenant imposed an obligation on the Members of the League, to respect and preserve as against external aggression the territory, integrity and existing political independence of all Members of the League. The Covenant further declares 'that any war or threat of war, whether immediately affecting any of the Members of the League or not, is a matter of concern to the whole League'. The Members of the League undertook to be responsible for collective defence and preservation of peace. Moreover, Article 16 of the Covenant, besides providing for economic sanction in case a war was resorted by a Member, declared that a Member which commenced a war in disregard of the Covenant, would be deemed to have committed an act of War against all other members. Taken in its literal sense this provision put an end to all neutrality inasmuch as the application of the sanctions provided for by the Article is inconsistent with the attitude of strict impartiality.

According to *Fenwick* the Covenant of the League of Nations put an end in principle to the traditional law of neutrality. *Oppenheim* has taken a different view when he observes : "Accordingly it was inaccurate to assume that the Covenant had abolished neutrality. Nor was it true that it had not affected neutrality at all. The correct view was probably that while in some cases, namely, where resort to war was not contrary to the Covenant, the latter had not altered the law of neutrality, it had without abolishing it vitally affected in those cases in which Members of the League were bound or authorised to apply sanctions under Article 16 of the Covenant."

Neutrality under the Pact of Paris (1928) or Kellog Briand Pact.—In 1928, a multilateral Treaty for the renunciation of war known as the Pact of Paris or the *Kellog Briand Pact* was concluded

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for the purpose of preventing recurrence of war. This pact imposed an obligation on the contracting parties to renounce war as an instrument of national policy in their relation with one another. The Pact, however, did not provide for measures of enforcement of this obligation and also was silent upon the right of self-defence of the contracting parties. Apparently, there was nothing in the terms of the Pact which took away or altered the rights and duties deriving from neutrality as to the effect of the Pact on neutrality.

Neutrality in the Second World War.—On the outbreak of the war in 1939, the traditional theory of neutrality came into play for a short time. The States outside the war in the beginning proclaimed their neutrality in such forms and took steps consistent with their attitude of impartiality. This state of affairs could not continue for a long time and the ruthless violation by Germany of the neutrality of Belgium, Holland, Denmark, and Norway in 1940 was a wide awakening to hard realities. History repeated itself and what happened in the First World War reocurred that is, neutrality came to an end.

Neutrality under the United Nations Charter.—Article 2 of the Charter of the United Nations imposes an obligation on the members to give the United Nations every assistance in any action it takes in accordance with the present Charter and to refrain from giving assistance to any States against which the United Nations have taken preventive or enforcement action. This obligation is inconsistent with the duty of impartiality deriving from neutrality. Again the Security Council in view of any threat to peace is authorized to make recommendations or take a decision as to the enforcement measures. The Charter makes it obligatory on all members to accept and carry out all decisions taken by the Security Council. The effect of this provision is that a member of the United Nations which is aloof from the war waged by another member has to give direct assistance in enforcement measures if decided to be taken by the Security Council. It would thus appear that a member cannot in such circumstances follow the traditional path of neutrality. Moreover, the principle of maintenance of peace and security by collective action pervading throughout the Charter renders it almost impossible for any member to be neutral and impartial. There is nothing in the articles of the Charter respecting the right of a State to be neutral, but the directive principles and the purposes expressed in the Charter exclude the admissibility of the status of neutrality in relation to the Msmbers of the United Nations. *Fenwick* observes: "The adoption of the Charter of United Nations on June 26, 1945, finally marked the end of neutrality as a legal system". [*Fenwick*—International Law (third Ed.), p. 621]. According to Hens Kelsen the provisions of

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the Charter of U N. supersedes the International Law and neutrality seems to be abolished.

Oppenheim holds a different view as to the effect of the Charter on neutrality when he observes : "While the Charter has effected in a decisive way the right of the members of the United Nations to remain neutral, it has not substantially abolished their right to neutrality either in wars between Members of the United Nations or in wars between non-members or between members and non-members. In principle, no member of the United Nations is entitled, at its discretion, to remain neutral in war in which the Security Council has found a particular State guilty of a breach of peace or of an act of aggression and in which it has called upon the Members of the United Nations concerned either to declare war upon the State or to take military action indistinguishable from war" [*Oppenheim*—International Law, Vol. II (Seventh Ed.), p. 647].

Q. 27. Write brief notes with illustrations on—

(A) Qualified neutrality,

(B) Quasi neutrality ; (I.A.S 1970),

(C) Rational Basis of neutrality.

A. (A) Qualified Neutrality —The distinction between perfect and qualified neutrality is not, at the present time, admissible. A State has to be neutral perfectly or not at all. A state was said to be perfectly or absolutely neutral when it did not render any assistance to either belligerent directly or indirectly or actively or passively. Neutrality was said to be qualified when a State while remaining neutral on the whole gave some assistance directly or indirectly to either belligerent in compliance with the terms of an existing treaty. *Oppenheim* to illustrate qualified neutrality, has given following instances :—

(1) In 1915, during the First World War, British and French troops were landed at Saonoka which was part of the territory of Greece, then neutral, in order to aid Serbia which was also an ally of Greece, Greece protested but did not oppose the landing.

(2) In April, 1917, Costa Rica offered her ports and Waters for the use of the Navy of the United States (who at the time had become a belligerent). Guatemala followed suit and Brazil, Uraguay, Salvador and Peru expressly modified their neutrality regulations in their directions. Uraguay, further issued a decree announcing that she would refrain from applying the rules of neutrality against any American State engaged in the defence of its right in a war with States in other continents.

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(B) There are two kinds of status of the parties who seeks the protection of neutrality—(a) the status of neutrality in a war proper ; and (b) the status of non-participation by States or non-State entities in a non-war armed conflict. The latter status is, sometime, loosely referred to as neutrality, but there are certain differences between it and neutrality proper. It is perhaps better to refer to it as quasi-neutrality.

States and non-States entities, not participating in a "non-war" armed conflict, have a status which yet remains to be defined by rules of International Law.

If the events in the Korean Conflict of 1950-52 supply any guide, it is clear that there is no rigid or fixed status or quasi-neutrality as in the case of neutrality in a war proper, but that the nature of the status must depend on the special circumstances of the particular conflict concerned.

In the case of an armed conflict which is subject to the peace enforcement action of the United Nations Security Council, the rights and duties of quasi-neutrals whether member States of the United Nations or not may be determined by decisions or recommendations of the Security Council. The matter may also be governed by recommendation of the General Assembly, *e.g.*, so far as United Nations Peace-making is concerned, paragraph 6 of Article 2 of the United Nations Charter, they have permissive, although not binding force.

(C) Neutrality is often justified because of the following considerations :

(a) that it serves to localise war ;

(b) that it discourages war ;

(c) that it enables States to keep out of war ;

(d) that it regulates international relations.

The second world war conclusively demonstrated the fallacies of (a) and (b), inasmuch as, the, neutrality of States such as Norway, Denmark, Holland and Belgium, proved an irresistible completion to forcible invasion, and prevented to the effective arrangements for their joint defence with the continuance that these States were speedily overrun by superior German forces. The result was to increase Germany's power in Europe to bring Italy into the war on Germany's side, and eventually to encourage Japan to precipitate hostilities in the Pacific. Thus, far from localising or discouraging war, the effect of neutrality was to transform a European struggle into a world conflict.

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As to (c), it was virtually in defence of its neutrality that the United States entered the first world war on the side of France and Great Britain.

As to (d), the experience of the League of Nations from 1920 to 1940 showed that the institution of neutrality is quite inconsistent with the maintenance in international relations of the rule of law. The unjustified reliance of States Members of the League on traditional nations of neutrality contributed towards preventing the League machinery from functioning on the outbreak of the second world war.

Q. 28. Dwell briefly on the rights and duties of neutral powers. (C.S.E. 1987).

A. Rights and duties of neutral powers.—The status of neutrality involves rights and duties for the neutrals as well as for the belligerents. The rights of the neutral States results in imposing corresponding duties on belligerents and the duties of neutral States are met by corresponding rights accruing to belligerents. Starke summarises the duties of neutral States as well as of belligerents as follows :

(1) Duties of abstention.

(2) Duties of prevention.

(3) Duties of acquiescence.

Oppenheim, however, observes that there are two rights and two duties deriving from neutrality for neutrals. According to him the two rights of neutrals are :

(1) "rights to demand such behaviour from each belligerent as is in accordance with their attitude of impartiality."

(2) "Right to demand that their intercourse and in particular their commerce with the enemy shall not be suppressed."

Right of Neutrals

According to *Lawrence* the rights of a neutral State are as follows :

1. To have its territory immune from hostile activities.—A neutral State has a right to take active measures for preventing belligerents from making use of neutral territories and neutral resources for the purpose of war and from interfering with its legitimate intercourse with either of them.

2. To have its Submarine cables unmolested as far as possible.—Where the cable connects the territory of a belligerent with that

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of a neutral, the belligerent is not entitled to seize or destroy it unless it is deemed absolutely essential for the self-preservation to the belligerent or when the belligerent has a real apprehension that it might be used to his detriment.

3. To have its territory immune from direct preparation for acts of hostility.—A neutral State will not allow erection of factories for arms and ammunitions and must not permit the formation of corps or combatants or the opening of recruitment offices on its territories.

4. To have the regulations made for protection of neutrality obeyed by the belligerent

5. To get reparation from any belligerent State which may have violated its neutrality.

Duties of neutrals towards belligerent.—They may be summed up as follows :

1. Acquiescence.—The neutral State must acquiesce in the acts of belligerent States with respect to the commerce of its nationals if they are duly warranted by the laws of war, for example the seizure of vessel under its flag for the carriage of contraband, adjudication by Prize courts and so on.

2. Abstention.—A neutral State cannot render any assistance to either belligerent. It cannot also render aid to one of the belligerent to the detriment of the other. The neutral State has to abstain from granting passage over its territories to belligarent forces and from co-operating directly or indirectly with either belligerent. A neutral State is forbidden to supply directly or indirectly to belligerent, warships, ammunition or war material of any kind whatsoever. A neutral State must not advance loan or grant subsidies to either belligerent, or provide shelter for a belligerent armed forces.

3. Prevention.—The neutral State is under a duty to prevent within its territory or jurisdiction such activities as the enlistment of troops for belligerent armies, preparations for hostilities by any belligerent of warlike measures in its territory or territorial waters. A neutral State is also under a duty to prevent establishment of prize courts on neutral territory.

4. Duties of restoration.—According to Lawrence, these duties arise when a belligerent breaks the law and flouts neutral sovereignty to the detriment of its foe. If for instance, it captures a prize within neutral waters, a double wrong is done. Both the powers whose authority is set at naught and the power which loses its vessel suffer through its misdeed. The injured belligerent must apply for the redress to the neutral within whose jurisdiction the unlawful act was

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committed and the neutral has a claim against the injuring belligerent for breaking the peace in contempt of its sovereignty rights.

Reparation.—If a neutral state case on the point is Albama claims duties, it may be held liable to pay compensation for them A leading case on the point is Albama Claims Arbitration, 1872. In this case Britain had to pay America 15500,000 dollars in gold in the form of compensation for the violation of laws of neutrality.

CHAPTER XXXIII

RIGHT OF ANGARY

Q. 29. Analyse the essential features of the right of angary. Fortify your answer with reference to such historical precedent and cases as you may be acquainted with.

Or

What is meant by 'right of angary' ? State its essential features by reference to some decided cases. (I.A.S. 1950 and 1957).

Or

What do you mean by any modern right of Angary ? Discuss in detail. (I.A.S. 1970).

A. Right of Angary.—Modern concept of right of angary differs from the old concept. Oppenheim viewed that the original right of angary was "to lay an embargo on, and seize neutral merchantmen in their harbours and to compel them and their crew to transport troops, ammunition and provisions to certain places on payment of freight in advance." In the exercise of this right the belligerents caused great disturbance in netural commerce and the States found it necessary to conclude treaties whereby they agreed to give up their right of angary. The ancient right of angary extended 'to both the neutral vessel and its crew.' But the modern right is limited only to neutral property.This modern right is "the right of belligerent to destroy or use in case of necessity for the purpose of offence and defence of neutral property in their territory or on enemy territory or on the open sea".

Essential features of the rights of angary.—

(1) The right vests in belligerents.

(2) The right is to be exercised only in case of necessity or in time of national emergency.

(3) The right can be exercised in respect of national property of all kinds, such as vessels, other means of transport of

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arms, ammunition, provisions and other property serviceable in war operations.

(4) The neutral property, in respect of which the right may be exercised must be on the belligerent or enemy territory or on the open sea.

(5) The exercise of this right is subject to payment of full compensation to the owner of the neutral property.

(6) The rights consists in using or destroying the neutral property.

It must, however, be noted that the right of angary is not deriving from neutrality but it is a right deriving from the law of war.

In its protest against the requisition of Dutch Vessels by the Allies in 1918, the Dutch Government challenged the right of angary of the British Government and characterised the alleged right as "an ancient rule unearthed for the occasion and adopted to entirely new conditions in order to excuse seizure *en masse* by a belligerent of the merchant fleet of a neutral country." The British Government made a full exposition of rule of International Law relating to the modern right of angary and maintained that the vessels were seized in accordance with International Law and practice.

France-German war and right of angary.—The right of angary found wide application during this war. The Germans seized hundreds of Swiss and Austrian railway carriages lying in France and utilized them for military purposes. The rules as to payment of compensation came in for test during this war. The Germans seized some British coast vessels lying in River Seine and sunk them in order to prevent French gunboats from coming up the river. The British Government lodged a protest. The Government while justifying the action on the ground of pressing danger refused to concede to the principle that there was a duty to indemnify the owners of the vessels sunk. Ultimately, Germany agreed to pay compensation.

Limitation of the right of angary.—The right of angary is derived from the law of war and has its own limitations. The Privy Council in the case of the Zamora, [The Zamora, (1916) 2 AC 77] declared that a belligerent has by International Law "the right to requisition vessels or goods in the custody of its prize courts pending a decision of the question whether they should be condemned or released but such right is subject to certain limitations. First, the vessel or goods

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in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war or other matters involving national security, there must be a real question to be tried so that it would be improper to order an immediate release. And thirdly, the right must be enforced by application to the prize court, which must determine judicially whether under the particular circumstances of the case, the right is exercisable" A belligerent has thus no unrestricted right to requisition vessel or goods which are in the custody of its prize court.

The right of angary depends on the existence of necessity and cannot be exercised when no necessity exists. According to *Bullock*— (a) it is the right of a State to requisition foreign ships, aircraft and other means of transport; (b) which are urgently required for the purpose of transport, and which, (c) are at the time of requisition within its territorial jurisdiction, but such requisitions can only be made; (d) in time of national emergency; and (e) subject to payment of full compensation, whilst (f) the service of foreign personnel (as for example, crews of the ships and aircraft) cannot be compelled in any circumstances.

The modern right of Angary.—The modern right of angary is a right of belligerents to destroy, or use, in case of necessity, for the purposes of offence and defence, neutral property on their territory, or on enemy territory, or on the open sea. This modern right of angary does not, as did the original right empower a belligerent to compel neutral individuals to render services, but only extends to neutral property.

CHAPTER XXXIV

BLOCKADE

Q. 30. Define blockade. What are the requirements of a Lawful blockade? How does it come to an end?

Or

Define blockade. What are the essentials of a binding blockade? How does it terminate? Refer to leading cases. (C. S. E. 1985.)

Ans. Blockade.—According to *Hall*, "Blockade in times of war consists in the interception by a belligerent of access to territory or to a place which is in the possession of his enemy. It is an act of war carried out by the warships of a belligerent, the act being directed to prevent access to or departure from a defined port of the enemy's coast. *Oppenheim* defines blockade as "the blocking by men of war of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress or egress of vessels or aircrafts of all nations." According to Starke, "A blockade occurs

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when a belligerant bars access to the enemy coast or port of it for the purposes of preventing ingress or egress of vessels or aircrafts of all nations.

Essentials of Lawful blockade.—The following are the essentials of a binding blockade :—

1. **Proper establishment.**—The blockade must be effected by men-of-war. The declaration that the enemy coast or port is blockaded must be made under the authority of the blockading State.

2. The approach to the enemy coast or port of it must be blockaded. It was accepted on the eve of the First World War that the blockade may extend to ports as well as to the whole or a part of the enemy coast. The practice of States shows that not only ports but the enemy coasts in its entirety or in part can be blockaded. The Declaration of London provided that 'a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy and that the blockading forces must not have access to neutral ports or coasts'.

3. **Notification.**—The blockade must be made known to other States. States in general with the exception of Great Britain and United States and Japan consider that notification of a blockade is essential. The usual practice is that the naval Commander of the blockading State sends a notification of the blockade, to the authorities of the coast or port blockaded to the foreign consuls stationed there and to all the neutral maritime States. Italy and France take a further precaution by notifying the fact of blockade to every neutral vessel approaching the scene of blockade. Great Britain, the United States and Japan however do not consider notification essential.

4. **Impartiality.**—It must be a universal blockade, that is to say, the vessels or aircraft of all nations without any discrimination be prevented from ingress or egress. The blockade must be applied impartially to the vessels and aircrafts of all nations.

5. **Effectiveness.**—It is universally recognised that a blockade to be binding must be effective and non-fictitious. This rule of effectiveness of a blockade requires the blockade to be maintained by such force as may make it dangerous for a vessel to have ingress or egress The First Armed Neutrality of 1780 lays down that a port should be considered blockaded if the blockading belligerent had neutral vessels there, so as to create an obvious danger for neutral vessels entering the port. The Declaration of Paris enacts that a blockade should be maintained by a force sufficient really to prevent access to the coast of the enemy.

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It may be noted that the test of the effectiveness lies in the real danger to the vessel seeking to have egress or ingress and that it is not necessary that the blockading force should be stationed in such a way as to form an impenetrable line or an arch of circumvallation. The blockade during Crimean War by a British cruiser stationed at a distance of one hundred and twenty miles from the blockaded port of Riga was held to be effective.

The blockade is to be maintained by men-of-war aided by other agencies, such as, aircraft. There can, however, be no blockade without men-of-war. No blockade can be maintained purely by aircraft, inasmuch as blockade is a naval institution.

6. Continuously maintained.—The point is almost covered with the requirement of effectiveness. The blockade must be continuously maintained by a sufficient and properly disposed force, rendering ingress or egress by other's vessels a matter of material danger. In case a blockading squadron is driven off by a superior force of the enemy, the blockade is rendered null and void. Temporary withdrawal of the blockading squadron due to bad weather however will not impair its effectiveness.

7. The purpose of the blockade must be to prevent egress from and ingress into the enemy coast.

8. Exemption to neutral ports.—Certain exemptions are provided to neutral ports during the blockade.

End of blockade.—A blockade comes to an end when :—

(1) the war comes to a close ;

(2) the blockading State voluntarily raises the blockade or puts any restrictions on the limits of the blockade ;

(3) the enemy force drives off the blockading forces ;

(4) the blockade ceases to be effective.

(5) the blockading State captures and occupies the blockaded coast or port.

In case the blockading State raises the blockade voluntarily it has to notify this act to neutral States. If the blockading forces having being driven off return and resume the blockade they have to make a declaration and notification as is needed in establishing a new blockade. A leading case relating to Blockade is Zamora (1916).

Q. 31. (a) Distinguish between 'strategic' and 'pacific' or 'commercial' blockade. (P. C. S. 1958).

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(b) Write a critical note on 'long-distance blockade'. Refer to relevant incidents. [P. C S. 1965, I A. S. 1977].

A. (a) **Strategic and Pacific Blockade.**—Blockade according to *Oppenheim*, is the blockading by men of-war of the approach to the enemy coast or port of it, for the purposes of preventing ingress and egress of vessels or aircrafts of all nations. It is termed 'strategic' when it forms a part of the other military operations directed against the blockaded power. It is called 'pacific' or 'commercial' when its object is simply to reduce the resources of the enemy by cutting off its external commerce. Pacific blockade brings out temporary suspension of the commerce of an offending State by closing the access to and exit from its coasts but without recourse to other hostile measures.

(b) Long-distance blockade.—This kind of blockade is the product of the First World War with its new circumstances of naval warfare In the early stages of the First World War, when Germany indiscriminately laid mines on the high seas, Great Britain announced that it would take similar measures in sslf-defence. Great Britain passed an order to detain and take into ports ships carrying goods of presumed enemy destination, ownership or origin. The Britain called it blockade while U. S. A. and other neutral countries condemned this type of long distance blockade.

Any way, the institution of long-distance blockade came to stay. It was re-instituted during the Second World War with greater severity. Confronted with indiscriminate minefields and submarine warfare. Great Britain in 1939 made an Order-in-Council which laid down that every merchantship which sailed from an enemy port after December 4, 1939, would be required to discharge in a British or Allied port all goods on board loaded in such enemy port The Order made the same provision for vessels sailing from a port other than an enemy port having on board goods of enemy origin or of enemy ownership. The order was followed by other similar orders which had the effect of stopping all German export and import trade. These measures were sought to be justified by the necessity of carrying on total economic war against Germany.

CHAPTER XXXV

CONTRABAND

Q. 32 Bring out the meanings of absolute contraband, conditional contraband and free articles, and note the consequences of carriage of contraband.

Or

'The classification of goods as contraband or not contraband

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has much perplexed text-writers and jurists'. Discuss. (P. C. S. 1960) (C. S. E. 1985).

A Concept of contraband and meaning —The term 'contraband' includes all articles having enemy destination and likely to be used for purposes of war. *Oppenhiem* defines 'contraband of war' as the designation of such goods as are forbidden by either belligerents to be carried to the enemy on the ground that they enable him to carry on the war with greater vigour'. But this definition is only formal, as it does not state what kinds of goods belong to the class of contraband and hence this has been much controverted. According to *Starke* 'contraband is the designation for such goods as the belligerents consider objectionable because they may assist the enemy in the conduct of war' Kelsen defines 'contraband of war as goods the transport of which to the enemy is forbidden by either belligerent in conformity with general international law.'

Grotius on contraband —Grotius did not use word 'contraband' but he enquired into the question as to what articles destined for the enemy in war were such as to entitle belligerents to capture them on their way to the enemy. He made a three-fold classification of all the articles. In the first place he puts all those articles which are by their very nature useful in warfare. e. g., arms and ammunition, and a belligerent was always justified in seizing them on their way to the enemy. In the second class came those articles which are of no use in war and Grotius held the view that a belligerent could not seize them. The third class contained articles which were 'useful both in war and out of war such as, money, provisions, ship, and other fittings'. The seizure of these articles depended on the circumstances and conditions of a particular war, for an article usually useful in peace may become useful, in a particular war. This classification of Grotious was accepted by many States like England and America till the end of nineteenth century.

The Supreme Court of U.S.A. also accepted this classification in *Peterhoff Case* [(1866) 5 Wallance 28].

The Declaration of London (1905) —The Declaration makes an attempt to reach a settlement as regards contraband of war in order to ensure peaceful trade. It drew up three lists. The first list was of articles of absolute contraband, that is to say, of articles which were useful only in war. The second was the list of articles of conditional contraband, i. e. articles which 'were susceptible of use in war as well as for purposes of peace.' The third was a 'free list' consisting of articles 'not susceptible of use in war'. Articles which were classed as absolute contraband were arms, ammunition, military and naval stores. Conditional contraband were articles of food and other provisions, fuel, ships, coal, gold, silver, and railway material. The 'free list' consisted of articles of

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luxury which are not at all useful in war. This 'free list' also included articles like raw cotton, hemp, rubber and metalic ores. The declaration, however, remained unratified but its merit lies in the fact that it continued to guide the States till the First World War.

The Declaration of London laid down the rule that articles for the exclusive use of the sick and the wounded are not contraband even if these are destined for the use of the enemy. It has given another rule that articles for the use of the vessel or for the use of her crew and passengers are free and are not liable to be considered as contraband.

Consequences of carriage of contraband—Seizure.—A vessel carrying contraband is liable to be captured by the warships of the belligerent. The declaration of London provides that a vessel carrying absolute or conditional contraband can be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage. Great Britain, on enacting the Maritime Rights Order-in Council of July 7, 1916, abandoned the declaration. The Maritime Right Order-in-Council provided that a "Neutral vessel with papers indicating a neutral destination, which notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage."

The present condition of the matter of carriage of contraband is, therefore, a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband. On the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband just as it empowers either belligerent to prohibit and punish breach of blockade.

Penalty for carriage of contraband —International Law recognizes the right of a belligerent to capture the vessels carrying contraband. The right of capture by belligerent can be exercised so long as the guilty neutral vessel is in delicts, that is to say she has not deposited the contraband goods It is now universally recognized that the contraband goods are liable to confiscation. But no unanimity exists with regard to the question as to whether the vessel and the innocent goods are to be confiscated. The British and American practice has been to confiscate the vessels :

(1) if the vessel and the contraband goods belonged to the same owner ; or

(2) in the case the owner of the vessel was not the owner of the contraband, if the vessel sailed with false papers ; or

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(3) if the vessels under a treaty with her flag state was bound not to carry contraband to the enemy and she was carrying contraband within the knowledge of the owner of the vessel.

According to British and American practice the innocent cargo is also liable to confiscation if the contraband and the innocent cargo belong to the same person.

The declaration of London provided that conditional and absolute contraband was liable to confiscation and that the vessel carrying them was also liable to confiscation if the contraband reckoned either by value, weight, volume or freight formed more than half the cargo.

In case, the contraband was of value not more than half the cargo the guilty vessel was liable to pay the cost incurred by the capturing vessel. The declaration further provides that innocent goods of captured vessel are goods liable to confiscation in case they belonged to the same owner as the contraband goods.

Q 33. The principle of Continuous Voyage or ultimate destination shall be applicable both in cases of contraband and of blockade. Discuss. (I. A. S. 1949)

A. The doctrine of continous voyage eame into prominence during the American Civil War when it was applicable to cases of blockade as well. Hyde observes: "During the Civil War large quantities of various forms of military supplies reached the blockade ports of the American Confederacy by means of an elaborate and successful system of blockade running. Such supplies originating in England, were carried on in English ships to neutral ports in the West Indies where they were transhipped and taken by other vessels to their destination. This traffic attained large dimensions. In order to thwart it, United States vessels of war proceeded to capture and send in for condemnation neutral ships and cargoes, ostensibly bound for neutral ports."

The true nature and scope of this doctrine of continuous voyage applicable alike to cases of contraband and blockade was described by *Wheaton*.

Examination into continuity of voyages occurs chiefly where the subject of the capturing power is supposed to be trading with the enemy or a neutral to be sending cotraband goods to the enemy. If a cargo is destined to be carried through blockade, it can be captured at any stage of the voyage.

Application of the doctrine of Continuous Voyage to cases of blockade.—In the leading case of the *Springbok* [5 Wallace 1 (1866), the U. S. Supreme Court condemned the cargo of a British vessel

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captured *en-route* to Nassau on the ground that the character of the cargo was such as to indicate that its true destination was a blockade port. The court observed : "We cannot doubt that the cargo was originally shipped with intent to violate the blockade ; that the owners of the cargo intended that it should be trans-shipped at Nassau to a smaller vessel more likely to succeed in reaching safely a blockaded port than the Springbok, that the voyage from London to the blockaded port was, as to cargo, both in the law and in the intent of the parties, one voyage ; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing."

In the case of the *Peterhoff* [5 Wallace 28 (1866)], a British vessel containing cargo of different types on a voyage from London to Matamoras in Mexico was captured. A part of the cargo which consisted of military articles whose evident destination was the Confederated cargo were released on the ground that the neutral commerce with Matamoras except in contraband was entirely free. The court held that the trade between London and Matamoras did not violate the blockade, even though the goods might be transported "by inland navigation", to the blockaded country.

Bermuda —[3 Wall. 514]. The case of the *Bermuda* is very significant. In this case the vessel, sailed under British flag from Liverpool. The vessel, after staying at St. Georges in Bermunda for some time without transhipment of the cargo sailed towards Nassau. She was captured on her voyage on the ground that her cargo which was by and large composed of munitions of war had been intended either directly or by transhipment to break the blockade of the southern ports and that both the vessels and the cargo were liable to be condemned. It was held by the court that "a transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or trans-shipments intervened." In view of the fact that the ultimate destination of the cargo was hostile and there was strong evidence of the enemy ownership of the vessel both the cargo and the vessel condemned.

The rule formulated in the case of the Springbok was severely criticized by the neutral States as having been instrumental in extending the blockade of enemy ports to neutral ports as well. The theory was condemned by a committee of the Institute of International Law as "a serious inroad upon the rights of the neutral nations" The Declaration of London also rejected the rule and provided that "whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if at the moment she is on her way to a non blockaded port". But this Declaration was not ratified and with the advent of the First World War "the condemned rule reappeared in more drastic form

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than ever before". Order-in-Council of March 30, 1916, enacted that "neither a vessel nor her cargo shall be immune from capture for breach of blockade upon the sole ground that she is at the moment on her way to a non-blockaded port." The principle was re-enacted with greater emphasis by the Maritime Rights Order-in-Council of July 7, 1916, in laying down that "the principle of continuous voyage or ultimate destination shall be applicable both in case of contraband and of blockade." A similar provision was made by the French Decree of April 12, 1916 incorporated in article 85 of the French Naval Instructions of 1934 : "No vessel shall be exempt from capture for violation of a blockade on the ground that she was at the time of visit sailing to a non-contraband port."

CHAPTER XXXVI

UN-NEUTRAL SERVICE

Q. 34. Outline the main feature of un-neutral service. Illustrate your answer by reference to decided cases.

Or

What is meant by un neutral service ? Discuss the law relating to it by reference to some decided cases. (I.A.S. 1951).

A. Un-neutral service.—The term un-neutral service covers an offence analogous to that of the carriage of contraband and carriage of persons and dispatches. The unratified Declaration of London employed this form to cover various acts, viz., the carriage of dispatches and persons by neutral vessels, the transmission of intelligence in the interest of the enemy, participation of neutral vessel in actual hostilities, voluntary subjection of the neutral to the orders of the enemy government and other similar acts rendering assistance to the enemy. Holland calls them enemy service while French writers call them 'assistance hostile'.

As pointed out by Starke.....the doctrine of unneutral service.....is the duty of owners or persons incharge of neutral vessels or aircraft not by any acts or conduct on their part to employ a vessel or aircrafts for obiects or purposes (other than carriage of contraband or breach of blockade) which may advance belligerant interests of one State and injure the same interests of the opponent.

Kinds of un-neutral service.—The more usual guilty activities of un-neutral service are transport to members of the enemy armed forces, carriage of dispatches to the enemy, taking a direct part in the hostilities, operating under charter to the enemy, and the transmission of intelligence in the interests of the enemy, etc.

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The un-neutral services for which a belligerent has a right to punish are :--

(1) **Carriage of Persons.**—A neutral vessel engaged in carrying persons for the enemy is guilty of tendering un-neutral service. The persons carried must either be members of the armed forces of the enemy or those who are going to join the armed forces of the enemy or those who are not members of the armed forces but who are in the service of the enemy and who are likely to be made prisoners of war or who are engaged in advancing the cause of the enemy. Want of knowledge or ignorance of the fact of enemy service or of the character of the persons carried constitutes no valid defence. It is the injurious service that counts in judging whether it is an un-neutral service and in giving a right to a belligerent to prevent it from being rendered in future. In the case of the *Caroline*. [4 C. Rob 256] the plea that the vessel was forced to carry French troop from Egypt to Italy during war between England and France was not accepted and the vessel was condemned for rendering un-neutral service.

Whether International Law permits a belligerent to capture persons of enemy nationality on board a neutral vessel on the ground these persons judged from their age and capacity are likely to be called for military service is one on which no mutuality among States exists. Great Britain and France during the First World War treated persons of enemy nationality on board-neutral vessels bound for enemy port as being in the service of the enemy by reason of their age. The case of *S. S. China* is important on the point. The American Vessel China was stopped by the British Cruiser Laurentic and persons having German, Austrian and Turkish nationality on board, the China were removed on the ground that the carriage of these persons constituted un-neutral service. The American Government protested on the ground that the rule is definite that only military and naval persons could be removed from neutral vessels on high seas and that persons are not liable to be captured on the high seas regardless of whether they are in the military service of the enemy. While the controversy was going on, the United States entered war with the result that the captured persons were released.

The case of *Asma Maru* gave rise to a sharp controversy between Japan and Great Britain on the right of a belligerent to capture persons on board neutral vessels on high seas. A British warship stopped a Japanese steamship. Asma Maru, on its way from Honolulu to Yokohama and removed 21 Germans that were on board that vessel. The Japanese Government protested and the British Government contended that the removed persons were merchant seamen whom the German Government wanted for service in its navy. The British Government further declared

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that some of the captured persons were unfit for military service and it was proposed to release them. It was maintained by Great Britain that other captured persons by reason of their age and capacity were fit for service in the German Navy and they could not be released. In the end 9 out of 21 persons were released.

Exception.—The rule of carrying persons in the service of the enemy is not without an exception. The customary international law permitted the carriage of diplomatic agents by neutral vessels to neutral territory. This exception is supported by the authority of the case of the Trent.

2. Transmission of intelligence to the enemy.—It is un-neutral service if a neutral merchant vessel is engaged in transmitting intelligence to the enemy. "Doubtless a belligerent possesses the right to intercept enemy despatches being carried by neutral ship, and purporting to relate to the conduct of war." [*Hyde*—International Law, Vol. III, p. 2173].

According to *Oppenheim* a neutral vessel in order that it may be held guilty for un-neutral service in carrying despatches must be proved that she knew of the character of the despatches and nevertheless took them on board or that she was directly hired for the purpose of carrying them.

A neutral vessel engaged in carrying enemy persons and guilty of un-neutral service is liable to be confiscated. The persons removed are liable to be made prisoners of war.

Q. 35. Distinguish between—

(a) Un-neutral service and contraband.

(b) Un-neutral service and hostile service.

A. (a) Un-neutral service and contraband distinguished.—Although Un-neutral Service is analogous to carriage of contraband, it is not identical with it. Carriage of contraband is with respect to goods only, while Un-neutral Service consists in carrying of persons and despatches. Carriage of contraband and Un-neutral Service differ essentially in character for, while contraband may be carried as a matter of commerce and not as a matter of service of a belligerent, the un neutral destination is result of a direct service of the enemy. Hostile destination is necessary for carriage of contraband while it is not essential in the case of Un-neutral Service.

"Thus hostile destination, proof of which plays so important a part in the treatment of contraband, need not always be shown to exist in order to justify interference with the carriage of enemy

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military persons for the right to intercept them may, in the particular case. rest upon the nature of their mission or service or upon their actual conduct while in transit." *Hyde*—International Law, Vol, III, p. 2164] The carriage of contraband is punished by confiscation of the objectionable cargo and in exceptional cases by condemnation of the vessel also ; but the penalty for un neutral service is condemnation of the vessel itself. The un-neutral service consists in rendering distinct belligerent service while carriage of contraband consists in transporting goods for military use of the belligerent.

(b) Un-neutral service and hostile service.—Un-neutral service consists in doing help of the enemy belligerent without actually participating in the war. Un-neutral service forms part of the other innocent employment. Hostile service consists in the direct help of military nature to the enemy belligerent. Article 46 of the Declaration of London, 1909, enumerates four instances of the hostile service—(1) when a neutral vessel takes a direct part in the hostilities, (ii) when she is under orders or control of an agent placed on board by the enemy government ; (iii) when she is in exclusive employment of the enemy government ; and (iv) when she is exclusively engaged in the transport of the enemy troops or the transmission of intelligence in the interest of the enemy.

CHAPTER XXXVII

VISIT AND SEARCH

Q. 36. Write a critical note on how, when and where the right of visit and search may be exercised. Can vessels be brought to port for search? What constitutes "Resistance to visitation" and what are the consequences of such resistance?

A. Nature of the Right of visit and search.—International Law conceded to every belligerent the right to visit and search neutral vessels for the purpose of ascertaining the character of the vessels and its cargo. In the case of the *Nereide* [9 Cranch 338] it was held that the right of visit and search is a right growing out of and ancillary to the greater right of capture. According to *Oppenheim*, the right of visit and search is not an independent right, but is involved in the right of either belligerent to punish neutral vessels, breaking blockade, carrying contraband and rendering un-neutral service. As observed by Starke, 'co-extensive with the right of seizing contraband or of capturing ships in breach of blockade, belligerents have long established custom of the right to and search neutral vessels on the high seas in order to determine the nature of the cargo and to check the destination and neutral character of the vessel.

Mode of visit.—The mode in which visit is made by a belige-

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rent warship is regulated by the laws of the visiting State and the rules of International Law are silent on the point. The vessel sought to be visited is asked to stop by belligerent men-of-war hailing or by firing one or two blank cartridges or, if necessary, by firing a shot across the bows of the vessel. After the vessel is stopped, one or two officers of the men-of-war go on board the vessel sought to be visited and then they sought the relevant papers of the ship to ascertain the destination of the vessel, the character of vessel and of the cargo. If on an inspection it appears that the vessel is innocent, she is allowed to continue her voyage. If on the other hand, it appears that the vessel is carrying contraband or engaged in un-neutral service or for any other reason is liable to be captured. The fact of the visit is then noted in the log-book of the ship.

The right of Search.—The right of search is exercised only when the ship's paper do not conclusively show that the vessel is innocent. The purpose of this right is only to remove suspicions about the innocence of the neutral vessel. The belligerent men-of-war in the exercise of the right of search are not entitled to detain the vessel for a longer period than is necessary or to capture it on insufficient grounds. The right of search must not be exceeded. "The process of mere investigation should never take the form of chastisement" [*Hyde*—International Law, Vol. VIII, p. 1964].

In view of Starke, the right of visit and search should be very cautiously exercised so that there should be the least inconvenience to the neutral ships. But if there are suspicious circumstances in respect of the ship then in order to take a thorough search of the ship, the ship can be taken to the port and, if necessary, may be submitted for the decision of the Prize Court.

Carthage case.—[J.B. Scott, Hague Court Reports, pp. 329-334]. —The case of Carthage lays down the limitation of the right of search. *Carthage*, a French mail steamer, was stopped on her voyage from Marseilles to Tunis during Turko-Italian war by an Italian destroyer. On an inspection it was found that *Carthage* had on its board an aeroplane was considered to be contraband and the *Carthage* was taken to a port and was detained for about a fortnight. The Court laid down the principle that "the legality of every act which goes beyond a mere search depends upon the existence either of a trade in contraband or of sufficient reasons to believe that such a trade exists, as in this respect the reason must be of judicial nature." In as much as, there existed no juridical reasons to hold that the aeroplane was contraband, the capture of the vessel was held to be unjustified.

Visit and Search of Mail Steamers.—The Hague Convention of 1907 declared that a mail ship should not be searched except when absolutely necessary. The practice of the United States has been

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long not to search mail steamers except on clear grounds of suspicion that the mail steamers are carrying contraband or attempting to commit a breach of the blockade. Great Britain did not during the two World Wars accept the principle that mail steamers were totally immune from visit and search. In the Second World War Great Britain asserted that a belligerent was at liberty to examine mail bag and, if necessary, their contents in order to assure itself that this did not contain any contraband.

Resistence to visit and search.—A belligerent man-of-war when resisted in the exercise of its right of visit and search is entitled to employ force and attack the vessel. The vessel which resists is not after capture subjected to visit or search If the vessel during such an attack is damaged or sunk, there can arise no cause of complaint. In case of resistence, the vessel is liable to be captured and confiscated. The continental practice, however, is in favour of confiscation only the vessel.

Maria.—The Maria—[(1799) C. Robe 340] —In the case of the *Maria*, a Swedish vessel sailing under a Swedish convoy was, during war between Great Britain and France, sought to be visited and searched by a British squadron. Forcible resistance was offered by the convoy and the Swedish vessel was captured. The British Prize Court gave the verdict of condemnation. Sir William Scott (Lord Stowell in this memorable case in delivering the judgment of the High Court of Admiralty) lays down the three followihg principles of law relating to the right of the visit and search and the consequences of resist ance :—

(1) That the righs of a belligerent to visit and search merchant ships in the high seas is an incontestable right.

(2) That the authority of the neutral soyereign being forcibly interposed cannot take away the right of visit and search.

(3) That the penalty for resistance of visit and search is the confiscation of the vessel.

Q. 37. Write a short note on 'the Right of Convoy'.

A. Right of Convoy —This right is claimed by neutral vessels which are escorted by neutral men-of war and consists in demanding immunity from visit and search for vessels sailing under the convoy of the men-of-war. In 1653, Sweden during war between England and Netherlands for the first time claimed this right and asked belligerents not to search its vessels sailing under the convoy of Swedish men of-war in case the Commander of the men of-war assured that there were no contraband on board the vessel In later wars this right was claimed by other continental neutral States. Great Britain did not recognise the right of convoy and during the

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First World War it refused to abstain from visiting and searching Dutch neutral vessels sailing under convoy. According to American practice, a neutral vessel sailing under convoy is immune from visit and search.

The unratified Declaration of London provided the neutral vessels sailing under neutral convoy were not liable to visit and search if the Commander gave in writing all information as to the character of the convoyed vessel and of the cargo. It further laid down that in case it appeared to the belligerent Commander that the information given by the Commander of the convoy was not correct, the belligerent Commander was to ask the Commander of convoy to investigate further with regard to the character of the vessel and of the cargo and to give him a report. The Commander of the convoy was authorised to withdraw its protection from the convoyed vessel in case he found that his report was such as justified capture.

It may also be noted that the so called right of convoy stated above implies that neutral vessel is escorted by a neutral warship and not applicable to cases where neutral vessels sail under belligerent convoy. Consequently, a neutral vessel under the convoy of a belligerent men-of-war is guilty and is liable to condemnation.

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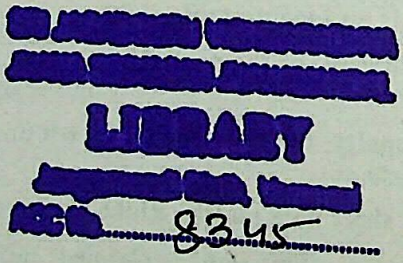

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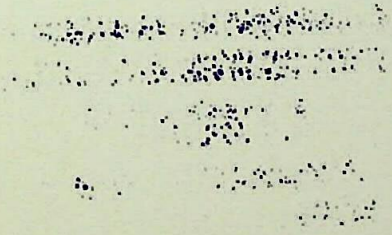

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